COMMENTARIES

ON THE

L A W S

OF

ENGLAND.

BOOK THE THIRD.

THE SIXTH EDITION.

Printed Page for Page with the last Oxford Edition.

By SIR WILLIAM BLACKSTONE,

ONE OF HIS MAJESTY'S JUSTICES OF THE HON. COURT OF COMMON PLEAS.

DUBLIN:

Printed for JOHN COLLES, No. 65, at the Corner of Temple-lane, Dame-street.

MDCCLXXV.

COMMENTARY

Well a delice wa



CHAP. STEEL

IV IS A MU

emustra oco

BOOK III.

arningsW statistics raisetimes 9 km 30

OF PRIVATE WRONGS.

CHAP. I.

MI .TABS

Of	the REDRESS	of PRIVATE	WRONGS	by the	mere
- 2	the REDRESS act of the	PARTIES.			Page 1.
	and first of	Crunanus !	L-JARE W	122	

Discourage of the REAL PRINCE

Of REDRESS by the mere operation of LAW.	18
--	----

CHAP. III.

OF CHARL OF CHATT

Of	COMPTE	-	neweral.		
U	Courts	in	genera.		

CHAP. IV.

Of the Public Courts of Common Law and 30 Equity.

CHAP. V.

Of Courts Ecclesiastical, Military, and
Maritime. 61.

CHAP.

CHAP. VI.

Of	COURTS of	a SPECIAL	JURISDICTION.	71.
----	-----------	-----------	---------------	-----

CHAP. VII.

Of the COGNIZANCE of PRIVA	E WRONGS. 86
----------------------------	--------------

CHAP. VIII.

Of	WRONGS,	and their	REMEDIES,	respecting	the	
	RIGHT	rs of Per	SONS	to .		115.

CHAP. IX.

Of INJURI	ES to	PERSONAL	PROPERTY.	144.
-----------	-------	----------	-----------	------

STAN SILVE SEE OF LAP. VXII TO SEE SOLK SILVE

Of INJURIES, to REAL DISPOSSESSION, or	PROPERTY, and	first of
DISPOSSESSION, or	OUSTER, of the	FREE-
HOLD.		

CHAP. XI.

Of	DISPOSSESSION,	or	OUSTER,	of	CHATTELS	
0.0	REAL.	5.53	si arauo"	7 1	0	198.

CHAP. XII.

OF	Tp	-	0		0	0	

Of Courts Dechangereal, Military

MARKET IE.

CHAP. XIII.

Of	N	U	S	A	N	C	E	

216.

208.

167.

0

0

CHAP.

1.

7.

8.

3.

16.

Pe

CHAP. XIV.

Of WASTE. 223. CHAP. XV. Of SUBTRACTION. 230. CHAP. XVI. Of DISTURBANCE. 236. CHAP. XVII. Of INJURIES proceeding from, or affecting the CROWN. 254. CHAP. XVIII. Of the PURSUIT of REMEDIES by ACTION; and, first, of the ORIGINAL WRIT. 270 CHAP. XIX. Of PROCESS. 279. CHAP. XX. Of PLEADING. 293. CHAP. XXI. Of Issue and DEMURRER. 314. CHAP. XXII.

Of the feveral SPECIES of TRIAL.

CHAP.

325

CHAP. XXIII.

Of the TRIAL by JURY.

349

CHAP. XXIV.

Of JUDGMENT and its INCIDENTS.

386.

CHAP. XXV.

Of PROCEEDINGS in the nature of APPEALS. 401.

CHAP. XXVI.

Of EXECUTION.

412

CHAP. XXVII.

Of PROCEEDINGS in the Courts of Equity. 426

Of the Owner Strains of

APPENDIX

G

APPENDIX.

86.

No. I. P	Proceedings on a Writ of RICHT Patents	Page i.
ş	RON.	URT BA-
\$. 2. Writ of TOLT to remove it into the COURT.	
5	COMMON PLEAS.	be court of ii.
\$. 4. Writ of RIGHT, quia dominus re	emisit Cu- ibid:
9	. 5. The Record, with award of Battel . 6. Trial by the grand Affise.	
No. II.	Proceedings on an Action of Trespass in MENT, by Original, in the King'	
	. 1. The Original Writ 2. Copy of the Declaration against the tor; who gives notice thereupon to in Possession.	
	. 3. The Rule of Court. . 4. The Record.	ix:
No. III.	Proceedings on an Action of DEBT, in of Common Pleas; removed into the	the Court
	Bench by Writ of ERROR.	xiii
	. 1. Original. . 2. Process.	ibid.
	the Court of King's Bench.	XVIII.
"§	. 4. Writ of Quo minus in the Excheque. 5. Special Bail; on the Arrest of the Duant to the Testatum Capias, in	efendant, purl
1	. 6. The Record, as removed by Writ of 7. Process of Execution.	

APPENDIX

L. Proceedings on a Michigan Patent. Phys. L.
S. I. Wid of Right Palent in the Court Has
S. to Hell of Tour to remove Time to Country
S. 2- Will of Pours, to season of this seems of
A. W. W. of Right, quindensinus maille Con-
is d. s. The Record, with greated of Bestell in.
The state of the s
9. 2. Oby of the Declaration of and the Elec-
to a grow girles not generally and the Transfer
S. r. The Holl of Court.
A Property of the State of Co.
Beach by Wit of England will will be
f. s. Original.
10 St 3. Bill of Mindledex, and Lames Hervetten in
There we have a summer of the state of the s
y. 6. The Record, are moved by Here of Exton.
Y Telleroft of Executive meters of the costs and

COMMENTARIESE

ONTHE

LAWS OF ENGLAND.

BOOK THE THIRD.

OF PRIVATE WRONGS.

CHAPTER THE FIRST.

OF THE REDRESS OF PRIVATE WRONGS BY THE MERE ACT OF THE PARTIES.

T the opening of these Commentaries (a) municipal law was in general defined to be, "arule of civil con"duct, prescribed by the supreme power in a state,
"commanding what is right, and prohibiting what is
"wrong (b)." From hence therefore it followed, that the primary objects of the law are the establishment of rights, and the
prohibition of wrongs. And this occasioned (c) the distribution
of these collections into two general heads; under the former of
which we have already considered the rights that were defined
and established; and under the latter are now to consider the
wrongs that are forbidden and redressed, by the laws of England.
Vol. III.

⁽a) Introd. § 2. Bract. l. 1. c. 3.
(b) Sanctio justa, jubens bonesta, et prohibens contraria, Cic.
(c) Book I. ch. 1.

In the profecution of the first of these enquiries, we distinguished rights into two forts: first, such as concern or are annexed to the persons of men, and are then called jura personarum, or the rights of persons; which, together with the means of acquiring and losing them, composed the first book of these Commentaries: and, fecondly, fuch as a man may acquire over external objects, or things unconnected with his person, which are called jura rerum, or the rights of things; and these, with the means of transferring them from man to man, were the subject of the fecond book. I am now therefore to proceed to the confideration of wrongs; which for the most part convey to us an idea merely negative, as being nothing else but a privation of right. For which reason it was necessary, that, before we entered atall into the discussion of wrongs, we should entertain a clear and distinct notion of rights: the contemplation of what is jus being necessarily prior to what may be termed injuria, and the definition of fas precedent to that of nefas.

WRONGS are divisible into two forts or species; private wrongs, and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, confidered as individuals; and are thereupon frequently termed civil injuries: the latter are a breach and violation of public rights and duties, which affect the whole community, confidered as a community; and are diftinguished by the harsher appellation of crimes and misdemesnors. To investigate the first of these species of wrongs, with their legal remedies, will be our employment in the present book; and the other species will bereferved till the next or concluding volume,

THE more effectually to accomplish the redress of privateinjuries, courts of justice are instituted in every civilized society in order to protect the weak from the infults of the stronger, by expounding and enforcing those laws, by which rights are defi ned, and wrongs prohibited. This remedy is therefore princi pall

Philips, 12.

ir

de

pa hi

pe

an

hin

fpe

len

nea

1-

z-

of

fe

er

ch

he

of

le-

dea

ht.

all

and

ing

ini-

vate

nton

uals,

med ublic

lered

ella-

thefe

em-

bere-

atem

ger, by

re defi

princi

pall

pally to be fought by application to thefe courts of juffice; that is, by civil fuit or action. For which reason our chief employment in this volume will be to confider the redrefs of private wrongs, by fuit or action in courts. But as there are certain injuries of fuch a nature, that some of them furnish and others require a more speedy remedy, than can be had in the ordinary forms of justice, there is allowed in those cases an extrajudicial or eccentrical kind of remedy; of which I shall first of all treat, before I consider the several remedies by suit: and to that end, shall distribute the redress of private wrongs into three feveral species; first, that which is obtained by the mere all of the parties themselves; secondly, that which is effected by the mere all and operation of law, and, thirdly, that which arises from suit or action in courts; which consists in a conjunction of the other two, the act of the parties co-operating with the act of law.

AND, first, of that redress of private injuries, which is obtained by the mere act of the parties. This is of two sorts; first, that which arises from the act of the injured party only; and, secondly, that which arises from the joint act of all the parties together: both which I shall consider in their order.

Or the first fort, or that which arises from the sole achos the injured party, is,

I. THE defence of one's felf, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace, which happens, is chargeable upon him only who began the affray (d). For the law in this case, respects the passions of the human mind; and (when external violence is offered to a man himself, or those to whom he bears a near connection) makes it lawful in him to do himself that immediate

(d) 2 Roll. Abr. 546. 1 Hawk. P. C. 131.

mediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say, to what wanton lengths of rapine or cruelty outrages of this fort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defence, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law particularly it is held an excuse for breaches of the peace, nay even for homicide itself; but care must be taken, that the resistance does not exceed the bounds of mere defence and prevention; for then the defender would himself become an aggressor.

II. RECAPTION or reprifal is another species of remedy by the mere act of the party injured. This happens, when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or fervant: in which case the owner of the goods, and the husband, parent, or mafter, may lawfully claim and retake them, wherever he happens to find them; so it be not in a riotous manner, or attended with a breach of the peace (e). The reason for this is obvious; since it may frequently happen that the owner may have this only opportunity of doing himfelf justice: his goods may be afterwards conveyed away or destroyed; and his wife, children, or servants, concealed or carried out of his reach; if he had no speedier remedy than the ordinary process of law. If, therefore, he can so contrive it as to gain possession of his property again, without force or terror, the law favours and will justify his proceeding. But, as the public peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons

e,

.

le

er

ſy

en

or

or

ıf-

ke

e).

en

m-

or

or

an

ive

rce

ut,

n's

wed.

cial

and

ons

it is provided, that this natural right of recaption shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seise him to my own use: but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen (f); but must have recourse to an action at law.

III. As recaption is a remedy given to the party himself, for an injury to his personal property, so, thirdly, a remedy of the same kind for injuries to real property is by entry on lands and tenements, when another person without any right has taken possession thereof. This depends, in some measure, on like reasons with the former; and, like that too, must be peaceable and without force. There is some nicety required to define and distinguish the cases, in which such entry is lawful or otherwise: it will therefore be more fully considered in a subsequent chapter; being only mentioned in this place for the sake of regularity and order.

IV. A FOURTH species of remedy by the mere act of the party injured, is the abatement, or removal, of nusances. What nusances are, and their several species, we shall find a more proper place to enquire under some of the subsequent divisions. At present I shall only observe, that whatsoever unlawfully annoys or doth damage to another, is a nusance; and such nusance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it (g). If a house or wall is erected so near to mine that it stops my antient lights, which is a private nusance, I may enter my neighbour's land, and peaceably pull it down (h). Or if a new gate be erected across the public highway, which is a common nusance, any of the king's subjects passing that way may cut it down, and destroy it (i). And

⁽f) 2 Roll. Rep. 55, 56. 208. 2 Roll. Abr. 565, 566.
(g) 5 Rep. 101. 9 Rep. 55. (h) Salk. 459. (i) Cro

the reason why the law allows this private and summary method of doing one's self justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice.

V. A FIFTH case, in which the law allows a man to be his own avenger, or to minister redress to himself, is that of differining cattle or goods for nonpayment of rent, or other duties; or, distreining another's cattle damage-feasant, that is, doing damage, or trespassing, upon his land. The former intended for the benefit of landlords, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter arising from the necessity of the thing itself, as it might otherwise be impossible, at a future time, to ascertain whose cattle they were that committed the trespass or damage.

As the law of distresses is a point of great use and consequence, I shall consider it with some minuteness: by enquiring, first, for what injuries a distress may be taken; secondly, what things may be distressed; and, thirdly, the manner of taking, disposing of, and avoiding distresses.

1. AND, first, it is necessary to premise, that a distress (i), districtio, is the taking of a personal chattel out of the possession of the wrong doer into the custody of the party injured, to procure a satisfaction for the wrong committed.

1. The most usual injury, for which a distress may be taken is that of nonpayment of rent. It was observed in a former volume (k), that distresses were incident by the common law to every rent-service, and by particular reservation to rent-scharges also; but not to rent-seck, till the statute 4 Geo.

II. c. 28. extended the same remedy to all rents alike, and thereby in effect abolished all material distinction between them. So that now we may lay it down as an universal principle,

(k) Book II. ch. 3.

⁽i) The thing itself taken by this process, as well as the process itself, is in our law-books very frequently called a distress.

t

S

-

5,

r

n

-

nt

(e

e-

T-

y,

of

i),

he

rty

ed.

en

ner

aw

nt-

eo.

and een rfal ple,

is,

principle, that a diffress may be taken for any kind of rent in arrear; the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it. 2. For neglecting to do fuit to the lord's court (1), or other certain personal fervice (m), the lord may diffrein, of common right. 3. For amercements in a court leet a diffress may be had of common right, but not for amercements in a court-baron, without a special prescription to warrant it(n). 4. Another injury, for which diftreffes may be taken, is where a man finds beafts of a stranger wandering in his grounds, damage-feafant; that is, doing him hurt or damage, by treading down his grafs, or the like; in which case the owner of the soil may distrein them, till satisfaction be made him for the injury he has thereby sustained. 5. Lastly, for feveral duties and penalties inflicted by special acts of parliament, (as for affeffments made by commissioners of sewers (o), or for the relief of the poor) (p) remedy by diffress and fale is given; for the particulars of which we must have recourse to the statutes themselves: remarking only, that such distresses (q) are partly analogous to the antient diffrefs at common law, as being repleviable and the like; but more refembling the common law process of execution by seifing and selling the goods of the debtor under a writ of fieri facias, of which hereafter.

2. SECONDLY; as to the things which may be distreined, or taken in distress, we may lay it down as a general rule, that all chattels personal are liable to be distreined, unless particularly protected or exempted. Instead therefore of mentioning what things are destreinable, it will be easier to recount those which are not so with the reason of their particular exemptions (r). And 1. As every thing which is distreined is presumed to be the property of the wrong doer, it will follow that such things, wherein no man can have an absolute and valuable property (as dogs, cats,

A 4.

⁽¹⁾ Bro Abr. tit. distress. 15. (m) Co. Litt. 46. (n)
Brownl. 36. (o) Stat. 7 Ann. c. 10. (p) Stat. 43 Eliz.
C. 2. (q) 4 Burr. 589. (r). Co. Litt. 47.

rabbets, and all animals ferae naturae) cannot be diffreined, Yet ifdeer (which are ferae naturae) are kept in a private inclosure for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandize, that they may be distreined for rent (s). 2. Whatever is in the personal use or occupation of any man, is for the time privileged and protected from any diffres; as an axe with whicha man is cutting wood, or a horse while a man is riding him. But horses, drawing a cart, may (cart and all) be distreined for rent-arrere; and also if a horse, tho' a man be riding him, be taken damage-feafant, or trespassing in another's grounds, the horse (notwithstanding his riding) may be distreined and led away to the pound (t). 3. Valuable things in the way of trade shall not be liable to diffres; as an horse standing in a smith's shop to be shoed, or in a common inn; or cloth at a taylor's house; or corn sent to a mill, or a market. For all these are protected and privileged for the benefit of trade; and are supposed in common prefumption not to belong to the owner of the house, but to his customers. But, generally speaking, whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to the tenantor a stranger, are distreinable by him for rent: for otherwise a door would be open to infinite frauds upon the landlord; and the stranger has his remedy over by action on the case against the tenant, if by the tenant's default the chattels are destreined, so that he cannot render them when called upon. With regard to a stranger's beasts which are found on the tenant's land, the following distinctions are however taken. If they are put in by consent of the owner of the beafts, they are distreinable immediately afterwards for rent-arrere by the landlord (v). So also if the stranger's cattle break the fences, and commit a trespass by coming on the land, they are distreinableimmediately by the leffor for his tenant's rent, as a punishment to the owner of the beafts for the wrong committed through his negligence (u). But if the lands were not fufficiently fenced fo as

⁽s) Davis v. Powell, C. B. Hil. 11 Geo. II. (t) 1 Sid. 440. (v) Cro. Eliz. 549. (u) Co. Litt. 47.

1.

ed,

n-

eir

ze,

he

vi-

ha

m.

ed

m,

ds,

ed

ide

h's

r's

0-

fed

fe,

ods

ley

im

ids

ac-

the

led

the

If

are

id-

m-

m-

tto

his

135

to

40.

(w) Lutw. 1580.

tione [caccaris. .

to keep out cattle, the landlord cannot diffrein them, till they have been levant and couchant (levantes et cubantes) on the land; that is, have been long enough there to have laid down and rose up to feed; which in general is held to be one night at least; and then the law presumes, that the owner may have notice whither his cattle have strayed, and it is his own negligence not to have taken them away. Yet, if the lessor or his tenantwere bound to repair the fences and did not, and thereby the cattle escaped into their grounds without the negligence or default of the owner; in this case, though the cattle may have been levant and couchant, yet they are not distreinable for rent, till i actual notice is given to the owner that they are there, and he neglects to remove them (w): for the law will not fuffer the landlord to take advantage of his own or his tenant's wrong. 4. There are also other things privileged by the antient common law; as a man's tools and utenfils of his trade, the axe of a carpenter, the books of a scholar, and the like, which are faid to be privileged for the fake of the public, because the taking them away would disable the owner from ferving the commonwealth in his station. So, beasts of the plough, averia carucae, and sheep, are privileged from distreffes at common law (x); while dead goods, or other fort of beafts, which Bracton calls catalla otiofa, may be diffreined. But, as beafts of the plough may be taken in execution for debt, fo they may be for distresses by statute, which partake of the nature of executions (y). And perhaps the true reason, why these and the tools of a man's trade were privileged at the common law, was because the distress was then merely intended to compel the payment of the rent, and not as a fatisfaction for its nonpayment: and therefore, to deprive the party of the instruments and means of paying it, would counteract the very end of the diffress (z). 5. Nothing shall be distreined for rent, which may not be rendered again in as good plight as when it was distreined: for which reason milk, fruit, and the like, cannot be distreined; a distress

> (x) Stat. 51 Hen. III. ft. 4. de diftric- -(y) 4 Burr. 589. (2) Ibid. 588.

A 5

at

at common law being only in the nature of a pledge or security, to be restored in the same plight when the debt is paid. So, antiently, sheaves or shocks of corn could not be distreined, because some damage must needs accrue in their removal: but a cart loaded with corn might; as that could be safely restored. But now by statute 2 W. & M. c. 5. corn in sheaves or cocks, or loose in the straw, or hay in barns or ricks, or otherwise, may be distreined as well as other chattels. 6. Lastly, Things fixed to the freehold may not be distreined; as caldrons, windows, doors, and chimney-pieces: for they savour of the realty. For this reason also corn growing could not be distreined; till the statute 1 r Geo. II. c. 19. empowered landlords to distrein corn, grass, or other products of the earth, and to cut and gather them when ripe.

LET us next consider, thirdly, how distresses may be taken, disposed of, or avoided. And, sirst, I must premise, that the law of distresses is greatly altered within a few years last past. Formerly they were looked upon in no other light than as a mere pledge or security, for payment of rent or other duties, or satisfaction for damage done. And so the law still continues with regard to distresses of beasts taken damage-feasant, and for other causes, not altered by act of parliament; over which the distressor has no other power than to retain them till satisfaction is made. But distresses for rent-arrere being found by the legislature to be the shortest and most effectual method of compelling the payment of such rent, many beneficial laws for this purpose have been made in the present century; which have much altered the common law, as laid down in our antient writers.

In pointing out therefore the methods of distreining, I shall in general suppose the distress to be made for rent; and remark, where necessary, the differences between such distress and one taken for other causes.

I.

d.

n-

V-

be

m

or

it-

li-

S:

W-

9.

0-

en,

nat

aft

ht

or

the

cen

of

ver

Tes

rt-

of

een

the

rall

re-

ress

In

In the first place then, all distresses must be made by day, unless in the case of damage-feasant; an exception being there allowed, left the beafts should escape before they are taken (a). And, when a person intends to make a distress, he must, by himself or his bailiff, enter on the demised premises; formerly during the continuance of the leafe, but now (b) he may diffrein within fix months after the determination of fuch lease whereon rent is due. If the lessor does not find sufficient distress on the premises, formerly he could refort no where else; and therefore tenants, who were knavish, made: a practice to convey away their goods and flock fraudulently from the house or lands demised, in order to cheat their landlords. But now (c) the landlord may diffrein any goods of his tenant, carried off the premises clandestinely, wherever he finds them within thirty days after, unless they have been bona fide fold for a valuable confideration: and all persons privy to, or affifting in, such fraudulent conveyance, forfeit double the value to the landlord. The landlord may also diftrein the beafts of his tenant, feeding upon any commons or waltes, appendant or appurtenant to the demised premises. The landlord might not formerly break open a house, to make a diffress, for that is a breach of the peace. But when he was in the house, it was held that he might break open an innerdoor (d): and now (e) he may, by the affiftance of the peace officer of the parish, break open in the day time any place, locked up to prevent a diffres; oath being first made, in case it be a dwelling-house, of a reasonable ground to sufpect that goods are concealed therein.

WHERE a man is intitled to distrein for an intire duty, he ought to distrein for the whole at once; and not for part at one time, and part at another (f). But if he distreins for the whole, and there is not sufficient on the premises, or he happens to mistake in the value of the thing distreined, and so takes an insufficient.

⁽a) Co. Litt. 142. (b) Stat. 8 Ann. c. 14. (c) Stat. 8 Ann. c. 14. 11 Geo. II. c. 19. (d) Co. Litt. 161. Comberb. 17. (e) Stat. 11 Geo. II. c. 19. (f) 2 Lutw. 1532.

C

C

to

C

d

ec

di

an

ft

th

go

or

pl

01

ficient distress, he may take a second distress to complete his remedy (g).

Distrisses must be proportioned to the thing distreined for. By the statute of Marlbridge, 52 Hen. III. c. 4. if any man takes a great or unreasonable distress, for rent-arrere, he shall be heavily amerced for the same. As if (h) the landlord distreins two oxen for twelve-pence rent; the taking of both is an unreasonable distress; but, if there were no other distress nearer the value to be found, he might reasonably have distreined one of them. But for homage, fealty, or suit, as also for parliamentary wages, it is saidthatno distress can be excessive (j). For as these distresses cannot be sold, the owner, upon making satisfaction, may have his chattels again. The remedy for excessive distresses is by a special action on the statute of Marlbridge; for an action of trespass is not maintainable upon this account, it being no injury at the common law (i).

WHEN the distress is thus taken, the next consideration is the disposal of it. For which purpose the things distressed must in the first place be earried to some pound, and there impounded by the taker. But, in their way thither, they may be rescued by the owner, in case the distress was taken without cause, or contrary to law: as if no rent be due; if they were taken upon the highway, or the like; in these cases the tenant may lawfully make rescue (k). But if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out; for they are then in the custody of the law (1).

A POUND (parcus, which fignifies any inclosure) is either pound-overt, that is, open overhead; or pound-eovert, that is, close. By the statute 1 & 2 P. & M. c. 12. no distress of cattle can be driven out of the hundred where it is taken, unless to a pound-

⁽g) Cro. Eliz. 13. Stat. 17 Car. II. c. 7. 4 Burr. 590. (h)
2 Inst. 107. (j) Bro. Abr. t. assis. 291. prerogative. 98.
(i) 1 Ventr 104. Fitzgibb. 85. 4 Burr. 590. (k) Co.
Litt. 160, 161. (l) Ibid. 47.

S

e

e

le

1-

n

18

ed

re

ey

en

if

fes

be

the

ley

her

is,

ttle

toa

nd-

(h)

pound-overt within the same shire; and within three miles of the place where it was taken. This is for the benefit of the tenants, that they may know where to find and replevy the distress. And by statue 11 Geo. II. c. 19. which was made for the benefit of landlords, any person distreining for rent may turn any part of the premises, upon which a distress is. taken, into a pound pro hac vice, for fecuring of fuch diffress. If a live diffress, of animals, be impounded into a common poundovert, the owner must take notice of it at his peril; but if in any special pound-overt, so constituted for this particular purpole, the distreinor must give notice to the owner: and, in both these cases, the owner, and not the distreiner, is bound to provide the beafts with food and necessaries. But if they be put into a pound-covert, as in a stable or the like, the landlord or diffreinor must feed and sustain them (m). A difirefs of houshold goods, or other dead chattels, which are liable to be stolen or damaged by weather, ought to be impounded into a pound-covert, else the distreinor must answer for the confequences.

WHEN impounded, the goods were formerly, as was before observed, only in the nature of a pledge or security to compel the performance of fatisfaction; and upon this account it had been held (n), that the distreinor is not at liberty to work or use a distreined beast. And thus the law still continues with regard to beafts taken damage-feafant, and diffresses for suit or services; which must remain impounded, till the owner makes satisfaction, or contests the right of diffreining, by replevying the chattels. To replevy (replegiare, that is, to take back the pledge) is, when a person difreined upon applies to the sheriff or his officers, and has the diffress returned into his own possession; upon giving good fecurity to try the right of taking it in a fuit at law, and. if that be determined against him, to return the cattle or goods once more into the hands of the distreinor. This is called a replevin, of which more will be faid hereafter. At present I shall only observe, that, as a distress is atcommon law only in nature

of

h

ti

ti

in

(1

of a fecurity for the rent or damages done, a replevin answers, the same end to the distressor as the distress itself; since the party replevying gives security to return the distress, if the right be determined against him.

THIS kind of distress, though it puts the owner to inconvenience, and is therefore a punishment to bim, yet, if he continues obstinate; and will make no satisfaction or payment, it is no remedy at all to the diffreinor. But for a debt due to the crown, unless paid within forty days, the diffress was always faleable at the common law (o). And for an amercement imposed at a court-leet, the lord may also fell the distress (p): partly, because, being the king's court of record, its process partakes of the royal perogative (q); but principally because it is in the nature of an execution to levy a legal debt. And, fo in the feveral statute-diffresses, before mentioned, which are also in the nature of executions, the power of fale is likewise usually given, to effectuate and complete the remedy. And, in like manner, by feveral acts of parliament (r), in all cases of diffres for rent, if the tenantor owner do not, within five days after the diffress is taken, and notice of the cause thereof given him, replevy the same with fufficient security; the diffreinor, with the sheriff or constable, shall cause the same to be appraised by two sworn appraisers, and fell the fame towards fatisfaction of the rent and charges; rendering the overplus, if any, to the owner himfelf. And, by this means, a full and intire satisfaction may now be had for rent in arrere, by the mere act of the party himself, viz. by distress, the remedy given at common law; and fale consequent thereon, which is added by act of parliament.

BEFORE I quit this article, I must observe, that the many particulars which attend the taking of a distress, used formerly to make it a hazardous kind of proceeding: for, if any one ir regularity

(q) Bro. ibid. 12 Mod. 330.

⁽c) Bro. Abr. t. distress. 71. (r) 2W. & M. c. 5, 8 Ann. c. 14. (p) 8 Rep. 41. 4 Geo. II. c. 28, 11 Geo. II. c. 19.

II.

ers.

the

on-

t, it

e to

al-

erce-

di-

cord,

inci-

a le-

fore-

, the

com-

Ets of

int or

, and

with

onfta-

praif-

t and

n may

party

law;

f par-

many ormerly one irregularity was committed, it vitiated the whole, and made the distreinors trespassors ab initio (s). But now by the statute 11 Geo. II. c. 19. it is provided, that, for any unlawful act done, the whole shall not be unlawful, or the parties trespassors ab initio: but that the party grieved shall only have an action for the real damage sustained; and not even that, if tender of amends is made before any action is brought.

VI. THE seising of heriots, when due on the death of a tenant, is also another species of self-remedy not much unlike that of taking cattle or goods in diffress. As for that division of heriots, which is called heriot-fervice, and is only a species of rent, the lord may distrein for this, as well as seife : but for heriot-custom (which Sir Edward Coke says (t), lies only in prender and not in render) the lord may feife the identical thing itself, but cannot destrain any other chattel for it (u). The like speedy and effectual remedy, of seising, is given with regard to many things that are faid to lie in franchife; as waifs, wrecks, eftrays, deodands, and the like; all which the person entitled thereto may seise, without the formal process of a fuit or action. Not that they are debarred of this remedy by action; but have also the other, and more speedy one, for the better afferting their property; the thing to be claimed being frequently of fuch a nature, as might be out of the reach of the law before any action could be brought.

THESE are the several species of remedies, which may be had by the mere act of the party injured. I shall, next, briefly mention such as arise from the joint act of all the parties together. And these are only two; accord and arbitration.

I. ACCORD is a fatisfaction agreed upon between the party injuring and the party injured; which, when performed, is a bar

ularity

⁽s) 1 Ventr. 37.

⁽t) Cop. §. 25.

⁽u) Cro. Eliz. 590. Cro. Car. 260.

c. 14

ar

bar of all actions upon this account. As if a man contract to build a house or deliver a horse, and fail in it; this is an injury, for which the sufferer may have his remedy by action; but if the party injured accepts a sum of money, or other thing, as a satisfaction, this is a redress of that injury, and entirely takes away the action (w). By several late statutes, particularly 11 GEO. II. c. 19. in case of irregularity in the method of distreining; and 24 GEO. II. c. 24. in case of mistakes committed by justices of the peace; even tendet of sufficient amends to the party injured is a bar of all actions, whether he thinks proper to accept of such amends or no.

II. ARBITRATION is where the parties, injuring and injured, fubmit all matter in dispute, concerning any personal chattels or personal wrong, to the judgment of two or more arbitrators; who are to decide the controversy: and if they do not agree, it is usual to add, that another person be called in as umpire, (imperator or impar) (x) to whose sole judgment, it is then referred: or frequently there is only one arbitrator originally appointed. This decision, in any of these cases, is called an award. And thereby the question is as fully determined, and the right transferred or fettled, as it could have been by the agreement of the parties, or the judgment of a court of justice (y). But the right of real property cannot thus pass by a mere award (z): which subtilty in point of form (for it is now reduced to nothing else) had its rise from feodal principles; for, if this had been permitted, the land might have been aliened collusively without the consent of the superior. Yet doubtless an arbitrator may now award a conveyance or a release of land; and it will be a breach of the arbitration-bond to refuse compliance. For, though originally the submission to arbitration used to be by word, or by deed, yet both of these being revocable in their nature, it is now become the practice to enter into mutual bonds, with condition to stand to the award or arbitration of the arbitrators or umpire

⁽w) 9 Rep. 79. (x) Whart. Aug. Sacr. I 771. (y) Brownl. 55. 1 Freem. 410. (2) 1 Roll. Abr. 242. 1 Lord Raym. 115.

II.

to

ry,

t if

is a

kes.

11

dif-

ted

s to

nks

ur-

nat-

rbi-

not as

it is

igi-

lled

red,

the

flice

nere

now

Vet reond
fion
betion
s or
pire

umpire therein named (a). And experience having shewn the great use of these peaceable and domestic tribunals, especially in fettling matters of account, and other mercantile transactions, which are difficult, and almost impossible to be adjusted on a trial at law; the legislature has now established the use of them, as well in controversies where causes are depending, as in those where no action is brought, and which still depend upon the rules of the common law: enacting, by statute 9 & 10 W. III. c. 15. that all merchants and others, who defire to end any controversy, (for which there is no other remedy but by personal action or suit in equity) may agree, that their submission of the suit to arbitration or umpirage shall be made a rule of any of the king's courts of record: and, after fuch rule made, the parties disobeying the award shall be liable to be punished, as for a contempt of the court; unless such award shall be set aside, for corruption or other milbehaviour in the arbitrators or umpire, proved on oath to the court, within one term after the award is made. confequence of this statute, it is now become a considerable part of the business of the superior courts, to set aside such awards when partially or illegally made; or to enforce their execution, when legal, by the same process of contempt, as is awarded for disobedience to those rules and orders which are issued by the courts themselves.

(a) Append. No. III. § 6.

CHAPTER

01

w

V

n

qu

01

d

I

57 atl

tter

CHAPTER THE SECOND.

OF REDRESS BY THE MERE OF LAW.

THE remedies for private wrongs, which are affected by the mere operation of law, will fall within a very narrow compass: there being only two instances of this fort that at present occur to my recollection; the one that of retainer, where a creditor is made executor or administrator to his debtor: the other, in case of what the law calls a remitter.

I. If a person indebted to another makes his creditor or debtee his executor, or if fuch creditor obtains letters of administration to his debtor; in these cases the law gives him remedy for his debt, by allowing him to retain fo much as will pay himself, before any other creditors whose debts are of equal degree (a). This is a remedy by the mere act of law, and grounded upon this reason; that the executor cannot, without an apparent abfurdity, commence a fuit against on himself as representative of the deceased, to recover that which is due to him in his own private capacity: but, having m the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, ath applied to that particular purpose. Else, by being made wn executor, he would be put in a worfe condition than all

^{(3) 1} Roll. Abr. 922 Plowd. 543.

III.

d by

narthat

iner, debt-

ch as

he rest of the world besides. For, though a rateable paynent of all the debts of the deceased, in equal degree, is clearly he most equitable method, yet as every scheme for a proortionable distribution of the assets among all the creditors ath been hitherto found to be impracticable, and productive f more mischiefs than it would remedy, fo that the creditor ho first commences his suit is entitled to a preference in payment; it follows, that as the executor can commence no uit, he must be paid the last of any, and of course must lose is debt, in case the estate of his testator should prove insolent, unless he be allowed to retain it. The doctrine of reiner is therefore the necessary consequence of that other offrine of the law, the priority of fuch creditor who first ommences his action. But the executor shall not retain his wn debt, in prejudice to those of a higher degree: for the wonly puts him in the same situation as if he had sued imfelf as executor, and recovered his debt; which he never buld be supposed to have done, while debts of a higher naare subsisted. Neither shall one executor be allowed to rein his own debt, in prejudice to that of his co-executor in for of qual degree; but both shall be discharged in proportion (b). f ad- or shall an executor of his own wrong be in any case permit-

II. REMITTER is where he, who hath the true property or act of sproprietatis in lands, but is out of possession thereof, and ath no right to enter without recovering possession in an acgainst on, hath afterwards the freehold cast upon him by some
that absequent, and of course desective, title: in this case he is
aving mitted, or sent back, by operation of law, to his antient
sufficient had more certain title (d). The right of entry, which he
law, ath gained by a bad title, shall be ipso facto annexed to his
made we inherent good one; and his deseasible estate shall be an all terly defeated and annulled, by the instantaneous act of the w, without his participation or consent (e). As if A disiles B, that is, turns him out of possession, and dies, leaving a fon

Viner. Abr. t. Executors. D. 2. (d) Litt. \$ 659. c) 5 Rep. 30. (e) Co. Litt. 358. Cro. Jac 489.

fon C; hereby the estate descends to C the son of A, and B is barred from entering thereon till he proves his right in an action: now, if afterwards C, the heir of the disseisor, makes lease for life to D, with remainder to B the disseise for life and D dies; hereby the remainder accrues to B, the disseise who thus gaining a new freehold by virtue of the remainder which is a bad title, is by act of law remitted, or in of his former and surer estate (f). For he hath hereby gained a new right of possession, to which the law immediately annexes his antient right of property

If the subsequent estate, or right of possession, be gained by a man's own act or consent, as by immediate purchase being of full age, he shall not be remitted. For the taking fuch fubsequent estate was his own folly, and shall be looked upon as a waiver of his prior right (g). Therefore it is be observed, that to every remitter there are regularly the incidents; an ancient right, and a new defeafible estate of freehold, uniting in one and the same person; which defeat fible estate must be cast upon the tenant, not gained by his own act or folly. The reason given by Lyttleton (h), wh this remedy, which operates filently and by the mere act of law, was allowed, is somewhat similar to that given in the preceding article; because otherwise he who hath right would be deprived of all remedy. For as he himself is the period in possession of the freehold, there is no other person again whom he can bring an action, to establish his prior right And for this cause the law doth adjudge him in by remitter that is, in fuch plight as if he had lawfully recovered the fame land by fuit. For, as lord Bacon observes (i), the be nignity of the law is fuch, as when, to preserve the principles and grounds of law, it depriveth a man of his remed without his own fault, it will rather put him in a better degree and condition than in a worse. Nam quod remedio defituitur, ipsa re valet; si culpa absit. But there shall be n remitter to a right, for which the party has no remed

⁽f) Finch. l. 194, Litt. §. 683.

⁽g), Co. Litt. 348. 350.

⁽h) §. 661.

⁽i) Elem. c. 9.

III. Bi

n ac-

kes

life,

nder,

of his

ned i

y an-

aine

chall

aking

oked is to

the ate of

lefea-

y his

act of

in the would perfor

gain

right

nitter

ed the

he be-

orinci-

emed

degree

defti

be m

emed

y action (k): as if the issue in tail be barred by the fine or arranty of his ancestor, and the freehold is afterwards cast pon him, he shall not be remitted to his estate tail (1): for the operation of the remitter is exactly the same, after the mion of the two rights, as that of a real action would have ten before it. As therefore the issue in tail could not by any stion have recovered his antient estate, he shall not recover by remitter.

And thus much for these extrajudicial remedies, as well or real as personal injuries, which are furnished by the law, here the parties are so peculiarly circumstanced, as not to be a le to apply for redress in the usual and ordinary methods to e courts of public justice.

A we bere is well not be improper to observe, the

is its feveral cafes of redeath but the off of the

to side of the same said that the

ty or the permits circumstance of their firm

more expeditions remedy, than the course

indicature can furnish.

defind mould, or relations, from extensel.

though I may rained my roods, if I lave a I

ble opportunity, this power of recaption does n

afterwards tentified to an aftion of efficient

oned in a former chancer (a), the law aller

(k) Co. Litt. 349.

(1) Moor. 115. 1 And. 286

rent aftin of trover or detinue: I may either oner astrone Thankel I have a right of entry, or may done

perfedion by real action: I may either abute a neighbor own authority, or call upon the law to do it forms may difficin for reas, or have an all ton of the stay or

E 15 E TO E HOL MOTHER COM

11 d5 (n)

i

he

a

ne

STATE CHAPTERS THE ENTH I RODUSTON

which to half not be senten to no ciga quit

was to several to a business and this professional Solvensen

entheries to be started the liber or tail and a sector alive

The best of the ground of the 22 of the miles

OF COURTS IN GENERAL.

THE next, and principal object of our enquiries is the redress of injuries by fuit in courts, wherein the act of the parties and the act of law co-operate; the act of the parties being necessary to set the law in motion, and by the process of the law being in general the only instrument, by who the parties are enabled to procure a certain and adequate a dress.

AND here it will not be improper to observe, that although in the several cases of redress by the act of the parties ment oned in a former chapter (a), the law allows an extrajudid remedy, yet that does not exclude the ordinary course of it flice: but it is only an additional weapon put into the hand of certain persons in particular instances, where natural equi ty or the peculiar circumstances of their situation required more expeditious remedy, than the formal process of an court of judicature can furnish. Therefore, though I m defend myself, or relations, from external violence, I am afterwards entitled to an action of affault and battery though I may retake my goods, if I have a fair and peace ble opportunity, this power of recaption does not debara from my action of trover or detinue: I may either enters the lands, on which I have a right of entry, or may dema possession by real action: I may either abate a nusance my own authority, or call upon the law to do it for me! may distrein for rent, or have an action of debt, at my or option

is t

act

e par

e pu

whid aten

hough

ment

iudici

e of it

hand

al equi

uired

of an

e, I

attery

peace

ebar II enter I dema

Sance |

or me

my on

option

ption: if I do not destrein my neighbour's cattle damage-feaant, I may compel him by action of trespass to make me a
air satisfaction: if a heriot, or a deodand, be withheld from
ne by fraud or force, I may recover it though I never seised.
And with regard to accords and arbitrations, these, in
heir nature being messely an agreement or compromise, must
adisputeably suppose a previous right of obtaining redress
one other way, which is given up by such agreement. But as
o remedies by the mere operation of law, those are indeed givn, because no remedy can be ministered by suit or action,
without running into the palpable absurdity of a man's bringing an action against himself: the two cases wherein they
appen being such, wherein the only possible legal remedy
rould be directed against the very person himself who seeks
elies.

In all other cases it is a general and indisputable rule, that here there is a legal right, there is also a legal remedy, by not or action at law, whenever that right is invaded. And, a treating of these remedies by suit in courts, I shall pursue the following method: first, I shall consider the nature and weral species of courts of justice: and, secondly, I shall oint out in which of those courts, and in what manner, the roper remedy may be had for any private injury; or, in ther words, what injuries are cognizabler, and how reducted, in each respective species of courts.

FFRST then, of courts of justice. And herein we will conder, first, their nature and incidents in general; and, then, he several species of them, erected and acknowleged by the lws of England.

A COURT is defined to be a place wherein justice is judially administered (b). And, as by our excellent constitution to sold executive power of the laws is vested in the person of the king, it will follow that all courts of justice, which are the medium

⁽b) Co. Litt. 58.

medium by which he administers the laws, are derived from the power of the crown (c). For whether created by act of parliament, or letters patent, or substituting by prescription, (the only methods by which any court of judicature (d) carexist) the king's consent in the two former is expressly, and in the latter impliedly, given. In all these courts the king is supposed in contemplation of law to be always present; but as the is in fact impossible, he is there represented by his judge, whose power is only an emanation of the royal prerogative.

FOR the more speedy, universal, and impartial administra tion of justice between subject and subject, the law hath appointed a prodigious variety of courts, fome with a more mited, others with a more extensive jurisdiction; some constituted to enquire only, others to hear and determine; form to determine in the first instance, others upon appeal and by way of review. All these in their turns will be taken no tice of in their respective places: and I shall therefore her only mention one distinction, that runs throughout them all viz. that some of them are courts of record, others not of ne cord. A court of record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony: which rolls are called the records of the court, and are of fuch high and fupereminent authority, that their truth is not to be called in question. For it is a settled rule and maxim that nothing shall be averred against a record nor shall any plea, or even proof, be admitted to the contrary (e). And if the existence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection whether there be any fuch record or no; else there would be no end of disputes. But, if there appear any mistake of the elerk in making up fuch record, the court will direct him to amend it. All courts of record are the king's courts, in right of his crown and royal dignity (f), and therefore no other court hath authority to fine or imprison; so that the very erection of

⁽c) See book I. ch. 7.

⁽d) Co. Litt. 260.

⁽e) Ibid.

⁽f) Finch. 1. 231.

Щ

ron

t of

ion,

car

id i

Suptha

lges,

ve.

ftra-

h apre licon-

fom

nd by

n no

hen

n all;

of re-

dicial

nemo-

of the , that

fettled

ecord

ontra-

hall be

ection

uld be

of the

im to

n right

r court tion of a new a new jurisdiction with power of fine or imprisonment makes it instantly a court of record (g). A court not of record is the court of a private man; whom the law will not intrust with any discretionary power over the fortune or liberty of his fellow-fubjects. Such are the courts-baron incident to every manor, and other inferior jurisdictions: where the proceedings are not enrolled or recorded: but as well their existence as the truth of the matters therein contained shall, if disputed. be tried and determined by a jury. These courts can hold no plea of matters cognizable by the common law, unless under the value of 40s; nor of any forcible injury whatsoever, not having any process to arrest the person of the defendant (h).

In every court there must be at least three constituent parts. the actor, reus, and judex: the actor, or plaintiff, who complains of an injury done; the reus, or defendant, who is called upon to make fatisfaction for it; and the judex or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears o have been done, to ascertain and by its officers to apply the remedy. It is also usual in the superior courts to have attornevs, and advocates or counsel, as affiftants,

An attorney at law answers to the procurator, or proctor, of the civilians and canonists (i). And he is one who is put in he place, stead, or turn of another, to manage his matters of aw. Formerly every fuitor was obliged to appear in person, to prosecute or defend his fuit, according to the old Gothic conhitution(k) unless by special licence under the king's letters paent (1). This is still the law in criminal cases. And an idiot canotto this day appear by attorney, but in person (m) for he hath ot discretion to enable him to appoint a proper substitute: and VOL. III. upon

(1) F. N. B. 25. (m) Ibid. 27.

⁽g) Salk. 200. 12 Mod. 388. (h) 2 Inst. 311. (i) Pope Boniface VIII, in 6 Decretal. i. 3. 1. 16. §. 3. speaks pantur." (k) Stiernhook de jureGoth. l. 1. c. 6.

C

h

gı

in

an

ca

ftr

the

cep

mi

erj.

ers.

Cod.

upon his being brought before the court in fo defenceless a con. dition, the judges are bound to take care of his interests, and they shall admit the best plea in his behalf that any one present can fuggeft (n). But, as in the Roman law, " cum olim inufu " fuiffet, alterius nomine aginon poffe, fed, quia hoc non minimam " incommoditatem babebat, coeperunt homines per procuratores " litigare (0)," fo with us, upon the same principle of convenience, it is now permitted in general, by divers antient statutes, whereof the first is statute West. 2. c. 10. that attorneys may be made to profecute or defend any action in the absence of the parties to the fuit. These attorneys are now formed into a regular corps; they are admitted to the execution of their office by the superior courts of Westminster-hall; and are in all points officers of the respective courts in which they are admitted: and, as they have many privileges on account of their attendance there, so they are peculiarly subject to the censure and animadversion of the judges. No man can practise as an attorney in any of those courts, but such as is admitted and fworn an attorney of that particular court : an attorney of the court of king's bench cannot practife in the court of common pleas; nor vice versa. To practise in the court of chanceryit is also necessary to be admitted a solicitor therein: and by the statute 22 Geo. II. c. 46. no person shall act as an attorney at the court of quarter fessions, but such as has been regularly admitted in some superior court of record. So early as the statute 4 Hen. IV. c. 18, it was enacted, that attorneys should be examined by the judges, and none admitted but fuch as were virtuous, learned, and fworn to do their duty. And many fubfequent statutes (p) have laid them under farther regulations.

OF advocates, or (as we generally call them) counsel, there are two species or degrees; barristers, and serjeants. The former are admitted after a considerable period of study, or at least standing, in the inns of court (q); and are in our old books stiled appress.

⁽n) Bro. Abr. 1. ideet. 1. (o) Inft. 4. tit. 10. (p) Jac. I. c. 7. 12 Geo. I. c. 29. 2 Geo. II. c. 23. 22 Geo. II. c. 46. 23 Geo. II. c. 26. (q) See vol. I. introd. § 1.

es

e-

es,

ay

of

nto

eir

in

are

heir

fure

s an

and

E the

mon

eryit

y the

ney at

y ad-

is the

hould

s were

y fub-

ations.

1, there

ks stiled

appren-

(p)

Geo. Il

. 1.

apprentices, apprenticii ad legem, being looked upon as merely learners, and not qualified to execute the full office of an advocate till they were fixteen years standing, at which time, according to Fortescue (r), they might be called to the state and degree of ferieants, or fervientes ad legem. How antient and honourable this state and degree is, the form, splendor, and profits attending it, have been fo fully displayed by many learned writers (s), that they need not be here enlarged on. I shall only observe, that serieants at law are bound by a solemn oath (t) to do their duty to their clients : and that by cuftom (u) the judges of the courts of Westminster are always admitted into this venerable order, before they are advanced to the bench; the original of which was probably to qualify the puine barons of the exchequer to become justices of affile, according to the exigence of the flatute of 14 Edw. III. c. 16. From both these degrees some are usually selected to be his majesty's counsel learned in the law; the two principal of whom are called his attorney, and folicitor general. The first king's counsel, under the degree of serjeant, was fir Francis Bacon, who was made to bonoris caufa, without either patent or fee (w); fo that the first of the modern order (who are now the fworn fervants of the crown, with a standing salary) feems to have been fir Francis North, afterwards lord keeper of the great feal to king Charles II (x). Thefeking's counsel answer in some measure to the advocates of the revenue, advocati fifei. among the Romans. For they must not be employed in any cause against the crown without special licence; in which refriction they agree with the advocates of the fife (y): but in the imperial law the prohibition was carried still farther, and perhaps was more for the dignity of the fovereign; for, excepting some peculiar causes, the fiscal advocates were not permitted to be at all concerned in private fuits between fubject and he forat leaf B 2 fubject.

> (t) De L. L. c. 50. (s) Fortele. ibid. 10 Rep. pref. Dugtal. Orig. Jurid. To which may be added a tract by the late erjeant Wynne, printed in 1765, intitled, "Observations touching the antiquity and dignity of the degree of ferjeant at law." (t) 2 Inft. 214. (u) Fortesc. c. 50. (w) See his leters, 256. Cod. 2. 9. 1. (x) See his life by Roger North. 37.

fubject (z). A custom has of late years prevailed of granting letters patent of precedence to fuch barrifters, as the crown thinks proper to honour with that mark of distinction : where. by they are entitled to fuch rank and pre-audience (a) as are affigned in their respective patents; sometimes next after the king's attorney general, but usually next after his majesty's counsel then being. These (as well as the queen's attorney and folicitor general)(b) rank promiscuously with the king's counfel, and together with them fit within the bar of the respective courts: but receive no falaries, and are not fworn; and therefore are at liberty to be retained in causes against the crown. And all other serieants and barristers indiscriminately (except in the court of common pleas, where only fer jeants are admitted) may take upon them the protection and defence of any fuitors, whether plaintiff or defendant, who are therefore called their clients, like the dependants upon the antient Roman orators. These indeed practised gratis, for honour merely, or at most for the sake of gaining influence: and so likewise is established with us (c), that a counsel can maintain no action for his fees; which are given not as locatio vel conductio, but as quiddam bonorarium; not as a falary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation (d): as is also laid down with regard to advocates in the civil law (e), whose bonorarium was directed by a decree of the fenate not to exceed in any cafe ten brahout a Lorenses. For they make not be employed

(z) Cod 2. 7. 13. (a) Pre-audience in the courts is reckoned of fo much confequence, that it may not be amife to fitjoin a short table of the precedence which usually obtains among the practifers. 1. The king's premier serjeant, (so constituted by special patent.) 2. The king's antient serjeant, or the eldest among the king's ferjeants. 3. The king's advocate general.
4. The king's attorney general.
5. The king's folicitor general.
6. The king's ferjeants. 7. The king's counsel, with the queen's attorney and folicitor. 8. Serjeants at law. 9. The recorder of London. 10. Advocates of the civil law. 11. Barrifters. In the court of exchequer two of the most experienced barrifters, called the post-man and the tub-man, (from the place in which they fit have also a precedence in motions. (b) Seld tit. hon. 1.-6. 7. (e) Ff. 11. 6. 1. (c) Davis pref. 22. 1 Chan. Rep. 38.

the control the crown without it entit

II.

ng

WII

re-

are

the

y's

ind

ın-

ive

re-

wn.

ept

nit-

any

all-

nan

ely, wife ac-

Etio. as a dogard

ectten

Arres

recfubmong ituted eldelt neral:

neral. h the The Barenced places Seld

p. 38.

thousand sefterces, or about 801. of English money (f). And, in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to the unfeemly licentiousness of prostitute and illiberal men (a few of whom may fometimes infinuate themselves even into the most honourable professions) it hath been holden that a counsel is not answerable for any matter by him spoken, relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless: but if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured (g). And counsel guilty of deceit or collusion are punishable by the statute Westm. 1. 3 Edw. I. c. 28. with imprisonment for a year and a day, and perpetual filence in the courts: a punishment still sometimes inflicted for gross misdemesnors in practice (h).

(f) Tac. aun. 1. 11. (h) Raym. 376. (g) Cro. Jac. 90.

secues silding dead ful sind sha A special

and other weight and definite dans

decembers. The course of public flowing

B 3 CHAPTER

and the extension of the foods to the second of the second

stant eliegts, and at the first time to give a object co

winds and Inggand alits a ware

C

fe d

in

4

"

16 :

"

inf

cor of.

jur

mo

die

(c)

CHAPTER THE FOURTH.

OF THE PUBLIC COURTS OF COMMON LAW AND EQUITY.

TE are next to confider the feveral species and distinctions of courts of justice, which are acknowledged and used in this kingdom. And these are either such as are of public and general jurisdiction throughout the whole realm; or fuch as are only of a private and special jurisdiction in some particular parts of it. Of the former there are four forts; the univerfally established courts of common law and equity; the ecclefiaftical courts; the courts military; and courts maritime. And, first, of such public courts as are courts of common law or equity.

THE policy of our antient constitution, as regulated and established by the great Alfred, was to bring justice home to every man's door, by constituting as many courts of judicature as there are manors and townships in the kingdom; wherein injuries were redreffed in an easy and expeditious manner, by the fuffrage of neighbours and friends. These little courts however communicated with others of a larger jurisdiction, and those with others of a still greater power; afcending gradually from the lowest to the supreme courts, which were respectively constituted to correct the errors of the inferior ones, and to determine fuch causes as by reafon of their weight and difficulty demanded a more solem discussion. The course of justice flowing in large streams from

1.

N

ncand

e of

lm;

ome

the

the

nari-

om-

and

ne to

dica-

lom;

tious

Chese

arger

wer;

ourts,

ors of

y reaolemn reams

from

from the king, as the fountain, to his superior courts of record; and being then subdivided into smaller channels, till the whole and every part of the kingdom were plentifully watered and refreshed. An institution that seems highly agreeable to the dictates of natural reason, as well as of more enlightened policy; being equally fimilar to that which prevailed in Mexico and Peru before they were discovered by the Spaniards; and that which was established in the Jewish republic by Moses. In Mexico each town and province had its proper judges, who heard and decided causes, except when the point in litigation was too intricate for their determination; and then it was remitted to the supreme court of the empire, established in the capital, and confifting of twelve judges (a). cording to Garcilasso de Vega (an historian descended from the antient Incas of that country) was divided into small districts containing ten families each, all registered, and under one magistrate; who had authority to decide little differences and punish petty crimes. Five of these composed a higher class or fifty families; and two of these last composed another called a hundred. Ten hundreds constituted the largest division, confisting of a thousand families; and each division had its separate judge or magistrate, with a proper degree of subordination (b). In like manner we read of Moses, that, finding the fole administration of justice too heavy for him, he " chose able men out of all Israel, such as feared God, men 4 of truth, hating covetousness; and made them heads over "the people, rulers of thousands, rulers of hundreds, rulers " of fifties, and rulers of tens: and they judged the people "at all feafons; the hard causes they brought unto Moses, "but every small matter they judged themselves (c)." These inferior courts, at least the name and form of them, still continue in our legal constitution: but as the superior courts of record have in practice obtained a concurrent original jurisdiction with these; and there is besides a power of removing plaints or actions thither from all the inferior jurifdictions; upon these accounts (among others) it has happened BA that

⁽²⁾ Mod. Un. Hist. xxxviii. 469. (b) Ibid. xxxix. 14.

0

CC

lo

to

th

of

lk

that these petty tribunals have fallen into decay, and almost into oblivion: whether for the better or the worse, may be matter of some speculation; when we consider on the one hand the encrease of expence and delay, and on the other the more upright and impartial decision, that follow from this change of jurisdiction.

THE order I shall observe in discoursing on these several courts, constituted for the redress of civil injuries, (for with those of a jurisdiction merely criminal I shall not at present concern myself) will be by beginning with the lowest, and those whose jurisdiction, though public and generally dispersed throughout the kingdom, is yet, (with regard to each particular court) confined to very narrow limits; and so ascending gradually to those of the most extensive and transcendent power.

I. THE lowest, and at the same time the most expeditious, court of justice known to the law of England is the court of piepoudre, curia pedis pulverizati: so called from the dusty feet of the fuitors; or according to fir Edward Coke (d), because justice is there done as speedily as dust can fall from the foot. Upon the same principle that justice among the Jews was administered in the gate of the city (e), that the proceedings might be the more speedy, as well as public. But the etymology given us by a learned modern writer (f) is much more ingenious and satisfactory; it being derived, according to him, from pied puldreaux a pedlar, in old French, and therefore fignifying the court of fuch petty chapmen as refort to fairs or markets. It is a court of record, incidentto every fair and market; of which the steward of him, who owns or has the toll of the market, is the judge. tuted to administer justice for all injuries done in that very fair or market, and not in any preceding one. So that the injury must be done, complained of, heard, and determined, within The court hath the compass of one and the same day. cognizance

⁽d) 4 Inst. 272. (e) Ruth. c. 4. (f) Barrington's observat, on the stat. 337.

A

e

ne

is

al

th

n-

ofe

fed

ra-

er.

us,

t of

ifty

d),

mor

the

the

olic.

f) is

ac-

nch,

n as

ntto

who

nfti-

fair

njury

ithin

hath

zance

gton's

cognizance of all matters that can possibly arise within the precinct of that fair or market; and the plaintiff must make oath that the cause of action arose there (g). From this court a writ of error lies, in the nature of an appeal, to the courts at Westminster (h). The reason of its institution seems to have been, to do justice expeditiously among the variety of persons, that resort from distant places to a fair or market: since it is probable that no other inferior court might be able to serve its process, or execute its judgments, on both or perhaps either of the parties; and therefore, unless this court had been erected, the complaint must necessarily have resorted, even in the first instance, to some superior judicature.

The court-baron is a court incident to every manor in the kingdom, to be holden by the steward within the faid manor. This court-baron is of two natures (i): the one is a customary court, of which we formerly spoke (k), appertaining entirely to the copyholders, in which their estates are transferred by furrender and admittance, and other matters transacted relative to their tenures only. The other, of which we now speak, is a court of common law, and it is the court of the barons, by which name the freeholders were fometimes antiently called; for that it is held before the freeholders who owe fuit and fervice to the manor, the steward being rather the registrar than the judge. These courts, though in their nature distinct, are frequently confounded together. The court we are now confidering, viz. the freeholder's court, was composed of the lord's tenants, who were the pares of each other, and were bound by their feodal tenure to affift their lord in the dispensation of domestic justice. This was formerly held every three weeks; and its most important business is to determine, by writ of right, all controversies relating to the right of lands within the manor. It may also hold plea of any personal actions, of debt, trespass on the case, or the lke, where the debt or damages do not amount to forty shillings.

⁽g) Stat. 17 Edw. IV. c. 2. (h) Cro. Eliz. 773. (i) Co. Litt, 58. (k) Book II. ch. 4. ch. 6. and ch. 22.

ti

iı

b

ai

fic

b

al

tic

de

M309

41

lings (1). Which is the same sum, or three marks, that bounded the jurisdiction of the antient Gothic courts in their lowest instance, or seeding-courts, so called because four were instituted within every superior district or hundred (m). But the proceedings on a writ of right may be removed into the county court by a precept from the sheriff called a tolt (n), "quia tollit atque eximit causame curia baronum (o)." And the proceedings in all other actions may be removed into the superior courts by the king's writs of pone (p), or accedas ad curiam, according to the nature of the suit (q). After judgment given, a writ also of salse judgment (r) lies to the courts at Westminster to rehear and review the cause, and not a writ of error; for this is not a court of record: and therefore in all these writs of removal, the first direction given is to cause the plaint to be recorded, recordari facias loquelam.

III. A HUNDRED court is only a larger court-baron, being held for all the inhabitants of a particular hundred instead of a manor. The free fuitors are here also the judges and the fleward the registrar, as in the cause of a court baron. It is likewife no court of record; resembling the former in all points, except that in point of territory it is of a greater jurisdiction (s). This is said by fir Edward Coke to have been derived out of the county court for the ease of the people, that they might have justice done to them at their own doors, without any charge or loss of time (t): but its institution was probably coeval with that of hundreds themselves, which were formerly observed (v) to have been introduced though not invented by Alfred being derived from the polity of the antient Germans. The centeni, we may remember, were the principal inhabitants of a district composed of different villages, originally in number an bundred, but afterwards only

⁽¹⁾ Finch 248. (m) Stiernhook de jure Goth l. 1. c. 1. (n) F. N. B. 3, 4. See append. No. I. §. 2. (o) 3 Rep. Pref. (p) See Append. No. I. §. 3. (q) F. N. B. 4. 70. Finch. l. 444, 445. (r) F. N. B. 18. (s) Finch. l. 248 4 Inft. 267. (t) 2 Inft. 71. (v) Vol. I. introd. §. 4.

1.

nat

eir

ere

But

the

1),

the

the

ad

dg-

irts

ot a

fore

ause

eing

d of

the It

n all

eater

have

peo-

own

stitu-

elves,

luced

polity

were

ferent

only

called

c. 2.

3 Rep. B. 4.

Finch.

I. 10

called by that name (u); and who probably gave the fame denomination to the district out of which they were chosen. Cæfar speaks positively of the judicial power exercised in their hundred-courts and courts-baron. "Principes regionum, atque " pagorum," (which we may fairly construe, the lords of hundreds and manors) " inter fuos jus dicunt; controversiasque "minuunt (w)." And Tacitus, who had examined their constitution still more attentively, informs us not only of the authority of the lords, but of that of the centeni the hundredors, or jury; who were taken out of the common freeholders, and had themselves a share in the determination. "Eli-" guntur in conciliis et principes, qui jura per pagos vicosque " reddunt: centeni singulis, ex plebe comites, confilium simul " et auctoritas, adfunt (x)." This hundred-court was denominated baereda in the Gothic conflitution (y). But this court, as causes are equally liable to removal from hence, as from the common court-baron, and by the fame writs, and may also be reviewed by writ of false judgment, is therefore fallen into equal difuse with regard to the trial of actions.

IV. The county court is a court incident to the jurisdiction of the sheriff. It is not a court of record, but may hold pleas of debt or damages under the value of forty shillings (z). Over some of which causes these inferior courts have, by the express words of the statute of Gloucester (a), a jurisdiction totally exclusive of the king's superior courts. For in order to be entitled to sue an action of trespass for goods before the king's justiciars, the plaintist is directed to make assistant that the cause of action does really and bona side amount to 40s: which assistant is now unaccountably disused (b), except in the court of exchequer. The statute also 43 Eliz. c. 6. which gives the judges in all personal actions where the jury assess damages than 40s. a power

⁽u) Centeni ex singulis pagis sunt, idque ipsum inter suos vocantur; et, quod primo numeros suit, jam nomen et honor est. Tac. de mor. Germ. c. 6. (w) De bell. Gall. l. 6. c. 22. (x) De morib German. c. 13. (y) Stiernhook, l. 1. c. 2. (1) 4 lnst. 266. (a) 6 Edw. I. c. 8. (b) 2 Inst. 391.

hi

in

he

ors

n l

nt f t

nd

tab

onc

ary

igh ouf

to certify the fame and abridge the plaintiff of his full costs, was also meant to prevent vexation by litigious plaintiffs; who, for purposes of mere oppression, might be inclinable to institute suits in the superior courts for injuries of a trifling value. The county court may also hold plea of many real actions, and of all personal actions to any amount, by virtue of a special writ called a justicies; which is a writ empowering the sheriff, for the sake of dispatch, to do the same justice in his county court, as might otherwise be had at Westminster (c). The freeholders of the county are the real judges in this court, and the sheriff is the ministerial officer. The great conflux of freeholders, which are supposed always to attend at the county court, (which Spelman calls forum plebeiae juftitiae et theatrum comitivae potestatis) (d) is the reason why all acts of parliament at the end of every fession were wont to be there published by the sheriff; why all outlawries of absconding offenders are there proclaimed; and why all popular elections which the freeholders are to make, as formerly of sheriffs and conservators of the peace, and still of coroners, verderors, and knights of the shire, must ever be made in pleno comitatus, or in full county court. By the statute 2 Edw. VI. c. 25. no county court shall be adjourned longer than for one month, confisting of twenty eight days. And this was also the antient ufage, as appears from the laws of king Edward the elder (e): " praep fitus (that is, the sheriff) adquartam circi-" ter feptimanam frequentent puli concionem celebrato; cuique " jus dicito; litefque singulas dirimito." In those times the county court was a court of great dignity and splendor, the bishop and the ealdorman (or earl) with the principal men of the shire, sitting therein to administer justice, both in lay and ecclefiaftical causes (f). But its dignity was much impaired, when the bishop was prohibited and the earl neglected to attend it. And, in modern times, as proceedings are removeable from hence into the king's fuperior courts, by writ of pone or recordare (g), in the fame manner as from hundred. courts,

⁽c) Finch 318. F. N. B. 152. (d) Gloff. v. comitatu. (e) c. 11. (f) LL. Eadgari c. 5. (g) F. N. B. 70. Finch. 445.

,

;

0 00

al

ne

r-

ce

er

is

eat

nd Ai-

all

be id-

ec-

iffs

de-

co-

VI.

one

the

the

rci-

ique

the

the

men lay

imected

e re-

dred-

urts,

tatus. B. 70. courts, and courts-baron; and as the same writ of false judgment may be had, in nature of a writ of error; this has occasioned the same disuse of bringing actions therein.

THESE are the several species of common law courts, which though dispersed universally throughout the realm, are nevertheless of a partial jurisdiction, and confined to particular districts: yet communicating with, and as it were members of, the superior courts of a more extended and general nature; which are calculated for the administration of redress not in any one lordship, hundred, or county only, but throughout the whole kingdom at large. Of which fort is,

V. The court of common pleas, or, as it is frequently termed in law, the court of common bench.

By the antient Saxon constitution there was only one supenor court of justice in the kingdom: and that had cognizance och of civil and spiritual causes; viz. the wittena-gemote, or general council, which affembled annually or oftener, wherever he king kept his Easter, Christmas, or Whitsuntide, as well o do private justice as to consult upon public business. he conquest the ecclesiastical jurisdiction was diverted into mother channel; and the Conqueror, fearing danger from hese annual parliaments, contrived also to separate their miinterial power, as judges, from their deliberative, as counselors to the crown. He therefore established a constant court n his own hall, thence called by Bracton (h) and other antint authors aula regia, or aula regis. This court was composed the king's great officers of state resident in his palace, nd usually attendant on his person: such as the lord high conable and lord mareschal, who chiefly presided in matters of onour and of arms; determining according to the law miliary and the law of nations. Besides these there were the lord igh steward, and lord great chamberlain; the steward of the outhold; the lord chancellor, whose peculiar bufiness it was

h

ai

he

lel

vas d;

ute

lew

un

erv

ente

fc

o p

(i)

16

to keep the king's feal, and examine all fuch writs, grants, and letters, as were to pass under that authority; and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were affisted by certain persons learned in the laws, who were called the king's justiciars or justices; and by the greater barons of parliament, all of whom had a feat in the aula regia, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these in their several departments transacted all secular business both criminal and civil, and like wife the matters of the revenue : and over all prefided one special magistrate, called the chief justiciar, or capitalis justiciarius totius Angliae; who was also the principal minister of flate, the second man in the kingdom, and by virtue of his office guardian of the realm in the king's absence. And this officer it was, who principally determined all the vast variety of causes that arose in this extensive jurisdiction; and from the plenitude of his power grew at length both obnoxious to the people, and dange ous to the government which employed him (j).

THIS great universal court being bound to follow the king! houshold in all his progresses and expeditions, the trial common causes therein was found very burthensome to the fubject. Wherefore king John, who dreaded also the power of the justiciar, very readily consented to that article which now forms the eleventh chapter of magna charta, and enach " that communia placita non sequantur curiam regis, sed tenear "tur in aliquo loco certo." This certain place was established in Westminster-hall, the place where the aula regis original fate, when the king refided in that city; and there it has ever fince continued. And the court being thus rendere fixed and stationary, the judges became so too, and a chi with other justices of the common pleas was thereupo appointed; with jurisdiction to hear and determine all ple of land, and injuries merely civil between subject and sub ject. Which critical establishment of this principal court commo

⁽j) Spelm, Gl. 331, Gilb. Hift. C. P. introd. 17.

II.

nd

gh

ing

ain

ıfti-

, all

d of

reat

ents ike

one

jufti-

er of

f his

1 this

from

ous to

loved

king's

rial of

to the

power which

enacts tenean

blifhed

iginall

it hat

endere

a chie

ereupo all plea

court o

common law, at that particular juncture, and that particular place, gave rife to the inns of court in its neighbourhood: and, thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who laboured to extirpate and destroy it (i). This precedent was soon after copied by king Philip the Fair in France, who about the year 132 fixed the parliament of Paris to abide constantly in that metropolis; which before used to follow the person of the king, wherever he went, and in which he himself used frequently to decide he causes that were the e depending : but all were then referred to the fole cognizance of the parliament and its learned udges (k). And thus also in 1495 the emperor Maximilian fixed the imperial chamber (which before always travelled with the court and houshold) to be constantly held at Worms, from whence it was afterwards translated to Spire (1).

The aula regia being thus stripped of so considerable a branch of its jurisdiction, and the power of the chief justiciar being also considerably curbed by many articles in the great harter, the authority of both began to decline apace under he long and troublesome reign of king Henry III. And, in arther pursuance of this example, the other several offices of he chief justiciar were under Edward the first (who new molelled the whole frame of our judicial policy) subdivided and roken into distinct courts of judicature. A court of chivalry vas erected, over which the constable and mareschal presidd; as did the steward of the houshold over another, constiuted to regulate the king's domestic servants. The high teward, with the barons of parliament, formed an august triunal for the trial of delinquent peers; and the barons reerved to themselves in parliament the right of reviewing the entences of other courts in the last resort. The distribution f common justice between man and man was thrown into provident an order, that the great judicial officers were

⁽i) See vol. I. introd. §. 1. (k) Mod. Un. Hist. xxiii. 395.

made to form-a checque upon each other: the court of chancery issuing all original writs under the great seal to the other courts; the common pleas being allowed to determine all causes between private subjects; the exchequer managing the king's revenue; and the court of king's bench retaining all the jurisdiction which was not cantoned out to other courts, and particularly the superintendence of all the rest by way of appeal; and the fole cognizance of pleas of the crown or criminal causes. For pleas or suits are regularly divided into two forts; pleas of the crown, which comprehend all crimes and misdemesnors, wherein the king (on behalf of the public) is the plaintiff; and common pleas, which include all civil actions depending between subject and subject. The former of these were the proper object of the jurisdiction of the count of king's bench; the latter of the court of common pleas: which is a court of record, and is stiled by fir Edward Coke (m) the lock and key of the common law; for herein only can real actions, that is, actions which concern the right of freehold or the realty, be originally brought: and all other, or personal, pleas between man and man are likewise her determined; though in some of them the king's bench has all a concurrent authority.

THE judges of this court are at present (n) four in number, one chief and three puisne justices, created by the king's letters patent, who sit every day in the four terms to hear and determine all matters of law arising in civil causes, whether real, personal, or mixed and compounded of both. These takes cognizance of, as well originally, as upon removas from the inferior courts before-mentioned. But a write error, in the nature of an appeal, lies from this court into the court of king's bench.

VI. TH

he

n

01

no

1

(o)

cide le in) At ort

latt

s in A l

⁽m) 4 Inst. 99. (n) King James I during part of hisrego appointed five judges in every court, for the benefit of a cashin voice in case of a difference in opinion, and that the circuits might at all times be fully supplied with judges of the superior court And, in subsequent reigns, upon the permanent indisposition of judge, a fifth hath been sometimes appointed. Raym. 475.

I.

n-

ner

all

the

all

rts,

v of

10

into

mes

olic)

erof

court

eas:

Coke

only

ht of

other,

here

is allo

mber,

's let-

ar and

hethe

hefe i

emov2

writ of

TH

is reign

a castin

ts mig

r court

tion of

VI. THE court of king's bench (so called because the king need formerly to sit there in person (o), the stile of the court still being coram ipso rege) is the supreme court of common aw in the kingdom; consisting of a chief justice and three ouisse justices, who are by their office the sovereign conservators of the peace, and supreme coroners of the land. Yet, hough the king himself used to sit in this court, and still is supposed so to do; he did not, neither by law is he empowered (p) to determine any cause or motion, but by the nouth of his judges, to whom he hath committed his whole udicial authority (q).

This court (which as we have faid) is the remnant of the ula regia, is not, nor can be, from the very nature and conitution of it, fixed to any certain place, but may follow the ng's person wherever he goes; for which reason all process luing out of this court in the king's name is returnable, ubicunque fuerimus in Anglia." It hath indeed, for some enturies past, usually sate at Westminster, being an antient alace of the crown; but might remove with the king to ork or Exeter, if he thought proper to command it. And e find that after Edward I. had conquered Scotland, it acally fate at Roxburgh (r). And this moveable quality, as ell as its dignity and power, are fully expressed by Bracton, hen he fays that the justices of this court are " capitales, generales, perpetui, et majores; a latere regis residentes; qui omnium aliorum corrigere tenentur injurias et errores (s)." and it is moreover especially provided in the articuli super car-(t) that the king's chancellor, and the justices of his bench, fhall

⁽o) 4 Inst. 73. (p) See book I ch. 7. The king used to cide causes in person in the aula regia. "In curia domini regis kin" propria persona jura decernit." Dial. de Scacch. 1. 1. §. After its dissolution, king Edward I. frequently sate in the urt of king's bench (See the records cited 4. Burr. 851.) And, latter times, James I. is said to have sate there in person, but informed by his judges that he could not deliver an opinion. 4 Inst. 71. (r) M. 20 21. Edw. I. Hale Hist. C. L. 200. L. 3. 6. 10. (t) 28 Edw. 1. c. 5.

1

e

th

ofe

e c

ve

pac

ry a

) a

shall follow him, so that he may have at all times near unto him some that be learned in the laws.

THE jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It fuperintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires in every case where there is no other specific remedy. I protects the liberty of the subject, by speedy and summar interposition. It takes cognizance both of criminal and civil causes; the former in what is called the crown-fide or crownoffice; the latter in the plea-fide of the court. The juil diction of the crown-fide it is not our present business to confder: that will be more properly discussed in the ensuing volume. But on the plea-side, or civil branch, it hath an orginal jurisdiction and cognizance of all trespasses, and other injuries, alleged to be committed vi et armis: which, being breach of the peace, favour of a criminal nature, alt'out the action is brought for a civil remedy; and for which the defendant ought in strictness to pay a fine to the king, as we as damages to the injured party (u). This court might like wife, upon the division of the aula regia, have originally hel plea of any other civil action whatfoever, (excepting action real, which are now very feldom in use) provided the defend ant was an officer of the court; or in the cultody of the mar shal, or prison-keeper, of this court, for a breach of the peace, or any other offence (w). In process of time, by fiction, this court began to hold plea of all personal action whatfoever, and has continued to do fo for ages (x): it being furmifed that the defendant is arrested for a supposed trespass which he never has in reality committed; and being the in the custody of the marshal of this court, the plaintiff at liberty to proceed against him for any other person injury: which furmife, of being in the marshal's custod

⁽u) Finch. I. 198. (w) 4 Inft. 71. (x) Ibid. 71.

III

into

cen-

Is of

s to

om.

ires,

. 1

mary

civil

OWII-

urif.

onfi-

ori-

othe

ing

0.19

ch th

S: We

like

y held

Stion

efend

of the

, by

action

being

espals

g thu

ntiff i

erfona uftody ne defendant is not at liberty to dispute (y). And these sistings of law, though at first they may startle the student, he sill find upon farther consideration to be highly beneficial and seful: especially as this maxim is ever invariably observed, nat no siction shall extend to work an injury; its proper peration being to prevent a mischief, or remedy an inconcinence, that might result from the general rule of law (z). In the present case, it gives the suitor his choice of more than no tribunal, before which he may institute his action; and revents the circuity and delay of justice, by allowing that it to be originally, and in the first instance, commenced this court, which, after a determination in another, might timately be brought before it on a writ of error.

For this court is likewise a court of appeal, into which ay be removed by a writ of error all determinations of the surt of common pleas, and of all inferior courts of record in agland: and to which a writ of error lies also from the court king's bench in Ireland. Yet even this so high and hourable court is not the dernier resort of the subject: for, if be not satisfied with any determination here, he may reve it by a writ of error into the house of lords, or the court exchequer chamber, as the case may happen: according the nature of the suit, and the manner in which it has been ofecuted.

VII. THE court of exchequer is inferior in rank not only to ecourt of king's bench, but to the common pleas also: but I we chosen to consider it in this order, on account of its double pacity, as a court of law and a court of equity also. It is a sy antient court of record, set up by William the Conqueror, as a part of the aula regia (c), though regulated and reduced

y) Thus too in the civil law: contra fictionem non admittitur batio quid enim efficeret probatio: veritatis, ubi fictio adversus itatem fingit? Nam fictio nihil aliud est, quam legis adversus itatem in re possibili ex justa causa dispositio. (Gothofred. in Ff. 2. t. 3.) (2) Rep. 30. 2 Roll. Rep. 502. (a) 11 Rep. 51. Co. t. 150. (b) Lamb. Archeion. 24. (c) Madox. Hist. Exch. 109.

le

c1

ei

fe

fo

en

e

ot

t w

duced to its present order by king Edward I (d); and intended principally to order the revenues of the crown, and to recover the king's debt and duties (e). It is called the exchequer, scaccharium, from the checqued cloth, resembling a chess board, which covers the table there; and on which, when certain of the king's accounts are made up, the sums are marked and scored with counters. It consists of two divisions: the receipt of the exchequer, which manages the royal revenue, and with which these Commentaries have no concern; and the court or judicial part of it, which is again subdivided into a court of equity, and a court of common law.

THE court of equity is held in the exchequer chamber before the lord treasurer, the chancellor of the exchequer, the chief baron, and three puisse ones. These Mr. Selden conjectures (f) to have been antiently made out of fuch as were barons of the kingdom, or parliamentary barons, and thence to have derived their name: which conjecture receives great strength from Bracton's explanation of magna carta, c. 14 which directs that the earls and barons be amerced by the peers; that is, fays he, by the barons of the exchequer (g) The primary and original business of this court is to call the king's debtors to account, by bill filed by the attorney general and to recover any lands, tenements, or hereditaments, and goods, chattels, or other profits or benefits, belonging to the crown. So that by their original constitution, the jurisdiction of the courts of common pleas, king's bench, and excheque, was entirely separate and distinct: the common pleas being in tended to decide all controversies between subject and subject the king's bench to correct all crimes and misdemesnors the amount to a breach of the peace, the king being then plaintif as fuch offences are in open derogation of the jura regalia of in crown; and the exchequer to adjust and recover his revenue wherein the king also is plaintiff, as the withholding and not payment thereof is an injury to his jura fiscalia. But, as by fiction almost all forts of civil actions are now allowed to brough

⁽d) Spelm. Guil. I. in cod. leg. vet. apud Wilkins. (e) 4 lnl. 103-116. (f) Tit. hon. 2. 5. 16. (g) l. 3. tr. 2. c. 1. § 3.

Щ

led

ver

1er,

ess, hen

are

vifi-

oyal

con-

fub-

w.

be-

con-

were

hence

great

C. 14

their

r (g)

all the

neral

s, any

to the

hequer

ubject

ors that

lainut

a of hi

evenue

nd non-

as by

d to b

brough

e) 4 Inf

brought in the king's bench, in like manner by another fiction ill kinds of personal suits may be prosecuted in the court of achequer. For as all the officers and ministers of this court ave, like those of other superior courts, the privilege of sung and being sued only in their own court; so also the king's lebtors, and farmers, and all accomptants of the exchequer, reprivileged to sue and implead all manner of persons in the ame court of equity that they themselves are called into. They have likewise privilege to sue and implead one anoner, or any stranger, in the same kind of common law actions (where the personalty only is concerned) as are prosecuted in the court of common pleas.

This gives original to the common law part of their jurifction, which was established merely for the benefit of the ing's accomptants, and is exercised by the barons only of e exchequer, and not the treasurer or chancellor. rit upon which all proceedings here are grounded is called quo minus: in which the plaintiff suggests that he is the ng's farmer or debtor, and that the defendant hath done m the injury or damage complained of; quo minus sufficis existit, by which he is the less able to pay the king his bt or rent. And the fuits are expressly directed, by what called the statute of Rutland (h) to be confined to such atters only as specially concern the king or his ministers of e exchequer. And by the articuli super castas (i) it is ented, that no common pleas be thenceforth holden in the chequer, contrary to the form of the great charter. But now, the fuggestion of privilege, any person may be admitted to ein the exchequer as well as the king's accomptant. The furfe, of being debtor to the king, is therefore become matter form and mere words of course, and the court is open to all enation equally. The fame holds with regard to the equity e of the court: for there any person may file a bill against other upon a bare fuggestion that he is the king's accomptant; twhether he is fo, or not, is never controverted. In this court, the equity fide, the clergy have long used to exhibit their

⁽h) 10 Edw. I. c. 11.

⁽i) 28 Edw. I. c. 4.

hE

T

iri

de

a l t

, (

e

g

la

H

bills for the non-payment of tithes; in which case the summer of being the king's debtor is no siction, they being bound pay him their first fruits, and annual tenths. But the charcery has of late years obtained a large share in this business.

An appeal from the equity side of this court lies immediately to the house of peers; but from the common law side in pursuance of the statute 31 Edw. III. c. 12, a writ of emmust be first brought into the court of exchequer chamber And from their determination there lies in the dernier result a writ of error to the house of lords.

VIII. THE high court of chancery is the only remaining and in matters of civil property by much the most importan of any, of the king's superior and original courts of justice It has its name of chancery, cancelaria, from the judge w presides here, the lord chancellor or cancellarius; who, Edward Coke tells us, is so termed a cancellando, from a celling the king's letters patent when granted contrary to la which is the highest point of his jurisdiction (k). But i office and name of chancellor (however derived) was certain known to the courts of the Roman emperors : where it one nally feems to have fignified a chief fcribe or fecretary, w was afterwards invested with several judicial powers, a general superintendency over the rest of the officers of prince. From the Roman empire it passed to the Rom church, ever emulous of imperial state; and hence ever bishop has to this day his chancellor, the principal jud of his confiftory. And when the modern kingdoms of Em were established upon the ruins of the empire, almost every preserved its chancellor, with different jurisdictions and dig ties, according to their different constitutions. But in all of the he feems to have had the fupervision of all charters, letters, 2 fuch other public instruments of the crown, as were authen cated in the most solemn manner; and therefore when seals ca in use, he had always the custody of the king's great seal. Sou

2 ... 463 1 . /

nan

es.

nedi

nbe

refor

ining

ortan

uftic

ho,

ma

to la

But the

it orig

rs, at

Roma ce eve

il jud

Euro

very h

nd dign

ters, a authen

ealscar

1. Sot

e office of chancellor, or lord keeper, (whose authority by atute 5 Eliz. c. 18. is declared to be exactly the same) is ith us this day created by the mere delivery of the king's eat feal into his cuftody (1): whereby he becomes, with. t writ or patent, an officer of the greatest weight and power any now fubfifting in the kingdom: and fuperior in int of precedency to every temporal lord (m). He is a ivy councellor by his office, and, according to lord chanlor Ellesmere (n), prolocutor of the house of lords by preiption. To him belongs the appointment of all justices of e peace throughout the kingdom. Being formerly usually ecclesiastic, (for none else were then capable of an office conversant in writings) and presiding over the royal cha-(o), he became keeper of the king's conscience; visitor, right of the king, of all hospitals and colleges of the king's indation; and patron of all the king's livings under the vaof 201. per annum in the king's books. He is the general ardian of all infants, idiots, and lunatics; and has the geal superintendence of all charitable uses in the kingdom. idall this, over and above the vast and extensive jurisdiction ich he exercises in his judicial capacity in the court of incery: wherein, as in the exchequer, there are two dithe tribunals; the one ordinary, being a court of common the other extraordinary, being a court of equity.

The ordinary legal court is much more antient than the art of equity. Its jurisdiction is to hold plea upon a feire has to repeal and cancel the king's letters patent, when de against law, or upon untrue suggestions; and to hold a of petitions, monstrans de troit, traverses of offices, the like: when the king hath been advised to do any or is put in possession of any lands or goods, in prejuce of a subject's right (p). On proof of which, as the gran never be supposed intentionally to do any wrong, law questions not but he will immediately redress the injury;

Lamb. Archeion 65. 1 Roll. Abr. 385. (m) Stat. 31 Hen. I. c. 10. (n) Of the office of lord chancellor. (o) Ma-Hift, of Exch. 42. (p) 4 Rep. 54.

(

or te

ave Eti

ll t.

ui

Ra

pr

injury; and refers that conscientious task to the chancello the keeper of his conscience. It also appertains to this cou to hold play of all personal actions, where any officer or m nister of the court is a party (q). It might likewise hold pl (by scire facias) of partitions of lands in coparcenary (r), a of dower (s), where any ward of the crown was concerned interest, so long as the military tenures subsisted : as it no may also do of the tithes of forest land, where granted by king, and claimed by a stranger against the grantee of the crown (t); and of executions on statutes, or recognizances nature thereof, by the statute 23 Hen. VIII. c. 6. (u). But any cause comes to issue in this court, that is, if any fact disputed between the parties, the chancellor cannot try i having no power to fummon a jury; but must deliver then cord propria manu into the court of king's bench, where shall be tried by the country, and judgment shall be the given thereon (w). And, when judgment is given in char cery, upon demurrer or the like, a writ of error, in natu of an appeal, lies out of this ordinary court into the court king's bench (x): though so little is usually done on the con mon law fide of the court, that I have met with no traces any writ of error (y) being actually brought, fince the for teenth year of queen Elizabeth, A. D. 1572.

In this ordinary, or legal, court is also kept the officinally titiae: out of which all original writs that pass under the grassial, all commissions of charitable uses, sewers, bankrupt idiocy, lunacy, and the like, do issue; and for which it is alway open to the subject, who may there at any time demand a have, ex debito justicae, any writthat his occasions may call to These writs (relating to the business of the subject) and the return that his occasions may call to the subject of the subject.

⁽q) 4 Inft. 80. (r) Co. Litt. 171. F. N. B. 62. (s) Bro. Abr. tit. dower. 66. Moor. 564. (t) Bro. Abr. t. disto. (u) 2 Roll. Abr. 469. (w) Cro. Jac. 12. (x) Ya book, 18. Edw. III, 25. 17. Aff. 24. 29 Aff. 47. Dyer 315. 1 Roll. 1682 (1 Vern. 131. 1 Equ. Caf. abr. 129.) that no such with of error lay, and that an injunction might be issued against it, see not to have been well considered.

turns to them were, according to the simplicity of antient times, originally kept in a hamper, in banaperio; and the others (relating to such matters wherein the crown is immediately or mediately concerned) were preserved in a little sack or bag, in parva baga; and thence hath arisen the distinction of the banaper office, and petty bag office, which both beong to the common law suit in chancery.

But the extraordinary court, or court of equity, is now beome the court of the greatest judicial consequence. This ditinction between law and equity, as administered in different ourts, is not at present known, nor seems to have ever been nown, in any other country at any time (2): and yet the lifference of one from the other, when administered by the ame tribunal, was perfectly familiar to the Romans (a); the us praetorium, or discretion of the praetor, being distinct rom the leges or standing laws (b): but the power of both entered in one and the same magistrate, who was equally ntrusted to pronounce the rule of law, and to apply it to articular cases by the principles of equity. With us too, he aula regia, which was the supreme court of judicature, indoubtedly administered equal justice according to the rules f both or either, as the case might chance to require : and, when that was broken to pieces, the idea of a court of equity, s distinguished from a court of law, did not subsist in the oriinal plan of partition. For though equity is mentioned by Bracton (c) as a thing contrasted to strict law, yet neither in hat writer, nor in Glanvil or Fleta, nor yet in Britton (compod under the auspices and in the name of Edward I. and VOL. I.

(2) The council of conscience, instituted by John III. king of ortugal, to review the sentences of all inserior courts, and modete them by equity, (Mod. Un. Hist. xxii. 237.) seems rather to ave been a court of appeal.

(a) Thus too the parliament Paris, the court of session in Scotland, and every other juristion in Europe of which we have any tolerable account, found I their decisions as well upon principles of equity as those of positive law. (Lord Kayms histor. law-tracts, I. 325, 330. princ. of suit. 44.)

(b) Thus Cicero; "jam illis promissis non essential session, quis non videt, quae coactus quis metu et deceptus doto promiserit? quae quidem plerumque jure praetorio liberantur, nonnulla legibus." Offic. I. 1.

(c) 1. 2. 6. 7. fol. 23.

it not by the of the

ncesi

ella

cou

or m

d ple

), an

nedi

But I fact I try it the n

here here the channel natur

ne com races on he four

cina ja he gra krupto s alway

and and call for and the

retun

(s) 0 t. difm (x) Yes 5. 1 Ro

per Non fuch wi

treating particularly of courts and their feveral jurisdictions) is there a fyllable to be found relating to the equitable jurisdiction of the court of chancery. It feems therefore probable, that when the courts of law, proceeding merely upon the ground of the king's original writs, and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the application for redress used to be to the king in person affisted by his privy council; (from whence also arose the jurisdiction of the court of requests (d), which was virtually abolished by the statute, 16 Car. I. c. 10) and they were wont to refer the matter either to the chancellor and a felect committee, or by degrees to the chancellor only, who mitigated the feverity or fupplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case. This was the cuftom not only among our Saxon ancestors, before the inftitution of the aula regia (e) but also after its dissolution, in the reign of king Edward I (f); and perhaps during its continuance, in that of Henry II. (g).

In these early times the chief juridical employment of the chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered. And to quicken the diligence of the clerks in the chancery, who were too much attached to antient precedents, it is provided by statute Westm. 2. 13 Edw. I. c. 24. that "whensoever from thenceforth in "one case a writ shall be found in the chancery, and in a "like case falling under the same right, and requiring like "remedy, no precedent of a writ can be produced, the "clerks"

(e) Nemo ad regem appellat pro aliqua lite, nisi jus domi consequi non possit. Si jus nimis severum sit, alleviatio deinde quatratur apud regem. LL. Edg. c. 2. (f) Lambard. Archeion sy

(g) Joannes Sarisburiensis (who died A. D. 1182, 26 Hen. II.) speaking of the chancellor's office in the verses prefixed to his polycraticon, has these lines:

Hic est, qui leges regni cancellat iniquas, Et mandata pii principis atque facit.

⁽d) The matters cognizable in this court, immediately before its diffolution, were "almost all suits, that by colour of equity, "or supplication made to the prince, might be brought before him: but originally and properly all poor men's suits, which were made to his majesty by supplication; and upon which they were intitled to have right, without payment of any money for the same." (Smith's commonwealth. b. 3. c. 7.)

Π.

) is

ion

hat

and

Aly

ap-

sted

tion

lby

the

r by

y or

urts

This

fore

oluring

f the

ed to

here

rence

ched

n. 2.

th in

in a

like

, the

clerks

before

quity,

e him:

ere in-

ni con-

e quat-

is poly-

"clerks in chancery shall agree in forming a new one: and, "if they cannot agree, it shall be adjourned to the next par"liament, where a writ shall be framed by consent of the
"learned in the law (h), lest it happen for the future that
"the court of our lord the king be deficient in doing justice
"to the suitors." And this accounts for the very great variety
of writs of trespass on the case, to be met with in the register;
whereby the suitor had ready relief, according to the exigency of his business, and adapted to the specialty, reafon, and equity of his very case (i). Which provision (with a little accuracy in the clerks of the chancery, and a little liberality in the judges, by extending rather than narrowing
the remedial effects of the writ) might have effectually answered all the purposes of a court of equity (k); except that
cf obtaining a discovery by the oath of the defendant.

But when, about the end of the reign of king Edward III. uses of land were introduced (1), and, though totally discountenanced by the courts of common law, were confidered as fiduciary deposits and binding in conscience by the clergy, the separate jurisdiction of the chancery as a court of equity began to be established (m); and John Waltham, who was bishop of Salisbury and chancellor to king Richard II. by a strained interpretation of the above-mentioned statute of Westim 2. devised the writ of subpoena, returnable in the court of chancery only, to make the feoffee to uses accountable to his ceftuy que use: which process was afterwards extended to other matters wholly determinable at the common law, upon false and fictitious suggestions; which therefore the chancellor himself is by statute 17 Ric. II. c. 6. directed to give damages to the parties unjustly aggrieved. But as the clergy, fo' early as the reign of king Stephen, had attempted to turn their ecclefiaftical

⁽h) A great variety of new precedents of writs in cases before unprovided for, are given by this very statute of Westm. 2.

⁽k) This was the opinion of Fairfax, a very learned judge in the time of Edward the fourth. "Le subpoena (fays he) ne serroit my "cy soventement use come il est ore, si nous attendomus tiels actions fur les cases, et mainteinomus le jurisdiction de ceo court, et d'auter courts "(Yearb. 21 Edw. IV. 23.) (l) See book II. ch. IX. (m) Spelm, Gloss, 106. 1 Ley. 242.

X

treating particularly of courts and their feveral jurisdictions) is there a fyllable to be found relating to the equitable jurifdiction of the court of chancery. It feems therefore probable, that when the courts of law, proceeding merely upon the ground of the king's original writs, and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the application for redress used to be to the king in person affisted by his privy council; (from whence also arose the jurisdiction of the court of requests (d), which was virtually abolished by the statute, 16 Car. I. c. 10) and they were wont to refer the matter either to the chancellor and a felect committee, or by degrees to the chancellor only, who mitigated the feverity or fupplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case. This was the custom not only among our Saxon ancestors, before the institution of the aula regia (e) but also after its dissolution, in the reign of king Edward I (f); and perhaps during its continuance, in that of Henry II. (g).

In these early times the chief juridical employment of the chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered. And to quicken the diligence of the clerks in the chancery, who were too much attached to antient precedents, it is provided by statute Westm. 2.

13 Edw. I. c. 24. that "whensoever from thenceforth in "one case a writ shall be found in the chancery, and in a "like case falling under the same right, and requiring like "remedy, no precedent of a writ can be produced, the "clerks"

(d) The matters cognizable in this court, immediately before its diffolution, were "almost all suits, that by colour of equity, "or supplication made to the prince, might be brought before him: but originally and properly all poor men's suits, which were made to his majesty by supplication; and upon which they were intitled to have right, without payment of any money for the same." (Smith's commonwealth. b. 3. c. 7.)

(e) Nemo ad regem appellat pro aliqua lite, nisi jus domi consequi non possit. Si jus nimis severum sit, alleviatio deinde quatratur apud regem. LL. Edg. c. 2. (f) Lambard. Archeion 59

(g) Joannes Sarisburiensis (who died A. D. 1182, 26 Hen. Il.) speaking of the chancellor's office in the verses prefixed to his posteration, has these lines:

Hic est, qui leges regni cancellat iniquas, Et mandata pii principis atque facit. IS

at

id

by he

by

or

nis ore

ung

he

to

ere

nce

ned

2.

in

n a

ike

the

rks

fore

ity,

im:

e in-

con-

159. II.)

poly-

"clerks in chancery shall agree in forming a new one: and, "if they cannot agree, it shall be adjourned to the next par"liament, where a writ shall be framed by consent of the
"learned in the law (h), lest it happen for the future that
"the court of our lord the king be deficient in doing justice
"to the suitors." And this accounts for the very great variety
of writs of trespass on the case, to be met with in the register;
whereby the suitor had ready relief, according to the exigency of his business, and adapted to the specialty, reason, and equity of his very case (i). Which provision (with a little accuracy in the clerks of the chancery, and a little liberality in the judges, by extending rather than narrowing
the remedial effects of the writ) might have effectually answered all the purposes of a court of equity (k); except that
of obtaining a discovery by the oath of the defendant.

But when, about the end of the reign of king Edward III. uses of land were introduced (1), and, though totally discountenanced by the courts of common law, were confidered as fiduciary deposits and binding in conscience by the clergy, the separate jurisdiction of the chancery as a court of equity began to be established (m); and John Waltham, who was bishop of Salisbury and chancellor to king Richard II. by a strained interpretation of the above-mentioned statute of Westin 2. devised the writ of subpoena, returnable in the court of chancery only, to make the feoffee to uses accountable to his ceftuy que use: which process was afterwards extended to other matters wholly determinable at the common law. upon false and fictitious suggestions; which therefore the chancellor himself is by statute 17 Ric. II. c. 6. directed to give damages to the parties unjuftly aggrieved. But as the clergy, fo early as the reign of king Stephen, had attempted to turn their ecclefiaftical

⁽h) A great variety of new precedents of writs in cases before unprovided for, are given by this very statute of Westm. 2.

⁽i) Lamb. Archeion. 61.

(k) This was the opinion of Fairfax, a very learned judge in the time of Edward the fourth. "Le subpoena (says he) ne serroit my "cy soventement use come il est ore, si nous attendomus tiels actions fur les cases, et mainteinomus le jurisdiction de ceo court, et d'auter courts " (Yearb. 21 Edw. IV. 23.) (1) See book II. ch. XX. (m) Spelm, Gloss, 106. 1 Ley. 242.

00

ecclefiaftical courts into courts of equity, by entertaining fuits pro laesione sidei, as a spiritual offence against conscience, in case of non-payment of debts or any breach of civil contracts: (n) till checked by the conftitutions of Clarendon (o), which declared that " placita de debitis, quae fide interposita deben-" tur, vel absque interpositione sidei, sint in justicia regis :" therefore probably the ecclefiaftical chancellors, who then held the feal, were remiss in abridging their own new-acquired jurisdiction; especially as the spiritual courts continued (p) to grasp at the same authority as before, in suits prolaessone sidei, so late as the fifteenth century (q), till finally prohibited by the unanimous concurrence of all the judges. However, it appears from the parliament rolls (r), that in the reigns of Henry IV. and V. the commons were repeatedly urgent to have the writ of fubpoena intirely suppressed, as being a novelty devised by the subtilty of chancellor Waltham, against the form of the common law; whereby no plea could be determined, unless by examination and oath of the parties, according to the form of the law civil, and the law of the holy church, in subversion of the common law. But though Henry IV. being then hardly warm in his throne, gave a palliating answer to their petitions, and actually passed the statute 4 Hen. IV. c. 23. whereby judgments at law are declared irrecoverable unless by attaint or writ of error, yet his fon put a negative at once upon their whole application; and in Edward IV's time, the process by bill and subpoena was become the daily practice of the court (f).

(n) Lord Lyttelt. Hen. II. b. 3. p. 361. not. (o) 10 Hen. II. c. 15. Speed. 458. (p) In 4 Hen. III. fuits in court christian pro laesione sidei upon temporal contracts were adjudged to be contrary to law. (Fitzh. Abr. t. Probibition. 15.) But in the statute or writ of circum/pecte agatis, supposed by some to have issued 13 Edw. I. but more probably (3 Pryn. Rec. 336.) 9 Edw. II. suits pro laesione sides were allowed to the ecclesiastical courts, according to some antient copies, (Berthelet stat antiq. Lond. 1531. 90. b. 3 Pryn. Rec. 336.) and the common English translation of that statute; though in Lyndewode's copy (Prov. 1. 2. t. 2) and in the Cotton MS (Claud. D. 2.) that clause is omitted. (q) Yearb. 2 Hon. IV. 10. 11 Hen IV. 88. 38 Hen. VI. 29. 20 Edw. IV. 10. (r) Rot. Parl. 4 Hen. IV. no. 78 & 110. 3 Hen. IV. no. 46. cited in Prynne's abr. of Cotton's records. 410. 422. 424. 548. 4 Inst. 83. 1 Roll. Abr. 370, 371, 372. (s) Rot. Parl. 14. Edw. IV. no. 33. (not 14 Edw. III. 28 cited 1 Roll. Abr. 370, \$6.)

gross

But this did not extend very far: for in the antient treatife, intitled diverfite des courtes (s), supposed to be written very early in the fixteenth century, we have a catalogue of the matters of conscience then cognizable by subpoena in chancery, which fall within a very narrow compass. No regular judicial fystem at that time prevailed in the court; but the fuitor, when he thought himself aggrieved, found a desultory and uncertain remedy, according to the private opinion of the chancellor, who was generally an ecclefiaftic, or fome times (though rarely) a statesman: no lawyer having sate in the court of chancery from the times of the chief justices. Thorpe and Knyvet, fuccessively chancellors to king Edward III. in 1372 and 1373 (t) to the promotion of Sir Thomas More by king Henry VIII. in 1530. After which the great feal was indifcriminately committed to the custody of lawyers, or courtiers (v), or churchmen (u), according as the convenience of the times and the disposition of the prince required, till serjeant Puckering was made lord keeper in 1592: from which time to the present the court of chancery has always been filled by a lawyer, excepting the interval from 1621 to 1625, when the feal was intrusted to Dr. Williams, then dean of Westminster, but afterwards bishop of Lincoln; who had been chaplain to Lord Ellesmere, when chancellor (w).

In the time of Lord Ellesmere (A. D. 1616) arose that notable dispute between the courts of law and equity, set on foot by Sir Edward Coke, then chief justice of the court of king's bench; whether a court of equity could give relief after or against a judgment at the common law. This contest was so warmly carried on, that indictments were preferred against the suitors, the folicitors, the council, and even a master in chancery, for having incurred a praemunire, by questioning in a court of equity a judgment in the court of king's bench, obtained by

^()Tit. chancery, fol. 296. Raftel.'s edit. A. D. 1534.

⁽t) Spelm. Gloss. 111. Dugd. chron. Ser. 50. (v) Wriothesly, St. John, and Hatton. (u) Goodsiek, Gardiner, and Heath. (v) Bigr. Brit. 4278.

ar

an

m

WI

ap

de

eir

cha

gross fraud and imposition (x). This matter, being brought before the king, was by him referred to his learned councel for their advice and opinion; who reported so strongly in favour of the courts of equity (y), that his majesty gave judgment on their behalf: but, not contented with the irrefragable reasons and precedents produced by his counsel, (for the chief justice was clearly in the wrong) he chose rather to decide the question by referring it to the plenitude of his royal prerogative (z). Sir Edward Coke submitted to the decision (a), and thereby made attonement for his error: but this struggle, together with the business of commendams (in which he acted a very noble part) (b) and his controlling the commissioners of sewers (c), were the open and avowed causes (d), first of his suspension, and soon after of his removal, from his office.

LORD Bacon, who succeeded Lord Ellesmere, reduced the practice of the court into a more regular system; but did not sit long enough to essect any considerable revolution in the science itself: and sew of his decrees which have reached us are of any great consequence to posterity. His successors, in the reign of Charles

(y) Whitelocke of (x) Bacon's works. IV. 611, 612, 632. (z) " For that it parl. ii. 399. 1 Chan. R. p. append. 11. sppertaineth to our princely office only to judge over all judges, " and to discern and determine such differences, as at any time may " and shall arise between our several courts touching thei jurisdic-"tions, and the same to settle and determine, as we in our princely " wisdom shall find to stand most with our honour, &c. " (1 Chas. (a) See the entry in the counc I book, " Rep. append. 26.) 26 July, 1616. (Biogr. Brit. 1390.) (b) In a caule of the bish p of Winchester, touching a commendam, king James, conceiving that the matter affected his prerogative, fent letters to the judges not to proceed in it, till himfelf had been first confulted. The twelve judges joined in a memorial to his majesty, declaring that their compliance would be contrary to their oaths and the law: but upon being brought before the king in counc l, they all retracted, and promised obedience in every such case for the future, except fir Edward Coke, who faid, " that when the case happened, " he would do his duty." (Biogr. Brit 1388.) (d) See lord Elleimere's speech to fir article in chap. vi. Henry Montague, the new chief justice, 15 Nov. 1616. (Moor's Reports, 828.) Though Sir Edward might probably have retained his feat, if during his fuspension he wou'd have complimented lord Villiers (the new favourite) with the disposal of the most lucrative office in his court. (Biog. Brit. 1391.)

d

Charles I. did little to improve upon his plan: and even after the restoration the seal was committed to the earl of Clarendon, who had withdrawn from practice as a lawyer near twenty years; and afterwards to the earl of Shaftefbury, who (though a lawyer by education) had never practifed at all. Sir Heneage Finch, who succeeded in 1673, and became afterwards earl of Nottingham, was a person of the greatest abilities and most uncorrupted integrity; a thorough master and zealous defender of the laws and conftitution of his country; and endued with a pervading genius, that enabled him to discoverand pursue the true spirit of justice, notwithstanding the embarrassiments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redress which had possessed the courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade and the abolition of military tenures, co-operated in establishing his plan, and enabled him in the course of nine years to build his system of jurisprudence and jurisdiction upon wide and rational foundations; which have also been extended and improved by many great men, who have fince prefided in chancery. And from that time to this, the power and business of the court have increased to an amazing degree.

From this court of equity in chancery, as from the other superior courts, an appeal lies to the house of peers. But there are these differences between appeals from a court of equity, and writs of error from a court of law: 1. That the former may be brought upon any interlocutory matter, the latter upon nothing but only a definitive judgment. 2. That on writs of error the house of lords pronounces the judgment, on appeals it gives direction to the court below to rectify its own decree.

IX. THE next court that I shall mention is one that hath no original jurisdiction, but is only a court of appeal, to correct the errors of other jurisdictions. This is the court of exchequer chamber; which was first erected by statute 31 Edw. III. c. 12.

C 4

P

1

7

1

tl

m

th

ar

be

fu

CO

in

ju

ed

ed

to determine causes upon writs of error from the common law side of the court of exchequer. And to that end it consists of the lord treasurer, the lord chancellor, and the justices of the king's bench and common pleas. In imitation of which, a second court of exchequer chamber was erected by statute 27 Eliz. c. 8. consisting of the justices of the common pleas, and the barons of the exchequer; before whom writs of error may be brought to reverse judgments in certain suits originally begun in the court of king's bench. Into the court also of exchequer chamber (which then consists of all the judges of the three superior courts, and now and then the lord chancellor also) are sometimes adjourned from the other courts such causes, as the judges upon argument find to be of great weight and difficulty, before any judgment is given upon them in the court below (e).

FROM all the branches of this court of exchequer chamber, a writ of error lies to

X. THE house of peers, which is the supreme court of judicature in the kingdom, having at present no original jurisdiction over causes, but only upon appeals and writs of error, to rectify any injustice or mistake of the law, committed by the courts below. To this authority they fucceeded of courfe, upon the diffolution of the aula regia. For as the barons of parliament were constituent members of that court, and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside; it followed, that the right of receiving appeals, and superintending all other jurisdictions, still remained in that noble assembly, from which every other great court was derived. They are therefore in all causes the last resort, from whose judgment no farther appeal is permitted; for every subordinate tribunal must conform to their determination. The law reposing an entire confidence in the honour and conscience of the noble perfons who compose this important assembly, that they will make

n-

of

yc

on

its

its

irt

he

he

ner |

of

en

er,

u-

if-

or, by

fe,

of

the

ver

ere

ht

ti-

ery

all

ap-

on-

ire

ervill ake make themselves masters of those questions upon which they undertake to decide; since upon their decision all property must finally depend.

HITHERTO may also be referred the tribunal established by statute 14 Edw. III. c. 5. consisting (though now out of use) of one prelate, two earls, and two barons, who are to be chosen at every new parliament, to hear complaints of grievances and delays of justice in the king's courts, and to give directions for remedying these inconveniences in the courts below. This committee seems to have been established, lest there should be a defect of justice for want of a supreme court of appeal, during the intermission or recess of parliament; for the statute farther directs, that if the difficulty be so great, that it may not well be determined without assent of parliament, it shall be brought by the said prelate, earls, and barons unto the next parliament, who shall finally determine the same.

XI. BEFORE I conclude this chapter, I must also mention an eleventh species of courts, of general jurisdiction and use, which are derived out of, and act as collateral auxiliaries to, the foregoing; I mean the courts of assis and nish prius.

THESE are composed of two or more commissioners, who are twice in every year sent by the king's special commission all round the kingdom (except only London and Middlesex, where courts of nist prius are holden in and after every term, before the chief or other judge of the several superior courts) to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the courts of Westminster-hall. These judges of assise came into use in the room of the antient justices in eyre, justiarii in itinere; who were appointed by the great council of the realm, A. D. 1176, 22 Hen. II (f), with a delegated power from the king's great court or aula regia, being looked upon as members thereof: and they made their circuit

⁽f) Seld. Jan. 1. 2. §. 5. Spelm. Cod. 329

1

d

F

round the kingdom once in feven years for the purpose of trying causes (g). They were afterwards directed by magna carta, c. 12. to be fent into every county once a year to take or try certain actions then called recognitions or affifes; the most difficult of which they are directed to adjourn into the court of common pleas, to be there determined. The present justices of assise and nist prius are derived from the statute Westm. 2. 13 Edw. I. c. 30. explained by several other acts, particularly the statute 14 Edw. III. c. 16. and must be two of the king's justices of the one bench or the other, or the chief baron of the exchequer, or the king's serjeants sworn. They usually make their circuits in the respective vacations after Hilary and Trinity terms; affifes being allowed to be taken in the holy time of lent by confent (h) of the bishops at the king's request, as expressed in statute Westm. 1. 3 Edw. I. c. 51. And it was also usual, during the times of popery, for the prelates to grant annual licences to the justices of affife to administer oaths in holy times: for oaths being of a facred nature, the logic of those deluded ages concluded that they must be of ecclesiastical cognizance (i). The prudent jealousy of our ancestors ordained (k) that no man of law should be judge of affife in his own country: and a fimilar prohibition is found in the civil law (1); which has carried this principle for far, that it is equivalent to the crime of facrilege, for a man to be governor of the province in which he was born, or has any civil connexion (m).

THE judges upon their circuits fit by virtue of five several authorities. 1. The commission of the peace. 2. A commission

⁽g) Co. Litt. 293. Anno 1261 justiciarii itinerantes wenerunt apud Wigorniam in octavis S. Johannis Baptihas;—et totus comtatus eos admittere recusavit, quod septem anni nondum erant elapsi, postquam justiciarii ibidem ultimo sederunt. (Annal. Eccl. Wigorn. in Whart. Angl. sacr. I. 495.) (h) It would have been strange to have denied this content, if, as Whitelocke imagines (on parl. 11. 260.) the hint of our justices of assie was taken from Samuel's going an annual circuit to judge Isiael, 2 Sim. vii. 16. (i) Instances hereof may be met with in the appendix to Spelman's original of the terms, and in M. Parker's Antiquities, 209. (k) Stat. 4 Edw. III. c. 2. 8 Ric. II. c. 2. 33 Hen. VIII. c. 24. (l) Ff. 1. 22. 3. (m) C. 9. 29. 4.

ıa

e

le

le

1t

te

s,

0

le

18

e

ıt

7.

7,

(e

d

y

90

n

le a

r

ıl

n

t

of over, and terminer. 3. A commission of general goal-delivery. The confideration of all which belongs properly to the subjequent book of these Commentaries. But the fourth commission is, 4. A commission of assige, directed to the judges and clerk of affife, to take affifes; that is, to take the verdict of a peculiar species of jury called an affise, and summoned for the trial of landed disputes, of which hereafter. The other authority is, 5. That of nisi prius, which is a consequence of the commission of assige (n), being annexed to the office of those justices by the statute of Westm. 2, 13 Edw. I. c. 30. And it empowers them to try all questions of fact issuing out of the courts at Westminster, that are then ripe for trial by jury. The original of the name is this: all causes commenced in the courts of Westminster-hall are by the course of the courts appointed to be there tried, on a day fixed in some Easter or Michaelmas term, by a jury returned from the county wherein the cause of action arises; but with this proviso, nisi prius justitiarii ad assisas capiendas venerint; unless before the day prefixed the judges of affife come into the county in question. This they are sure to do in the vacations preceding each Eafter and Michaelmas terms, and there dispose of the cause; which saves much expence and trouble, both to the parties, the jury, and the witnesses.

These are the several courts of common law and equity, which are of public, and general jurisdiction throughout the kingdom. And, upon the whole, we cannot but admire the wise economy and admirable provision of our ancestors, in settling the distribution of justice in a method so well calculated for cheapness, expedition, and ease. By the constitution which they established, all trivial debts, and injuries of small consequence, were to be recovered or redressed in every man's own county, hundred, or perhaps parish. Pleas of freehold, and more important disputes of property, were adjourned to the king's court of common pleas, which was fixed in one place for the benefit of the whole kingdom. Crimes and missemesnors were to be examined in a

court

0

red

of i

tar

Hi&

of c

mai

he

mar

I

ou

of c

wee

our

igh

ime

his

r in

her

ll c

eing

o th

(a)

court by themselves; and matters of the revenue in another distinct jurisdiction. Now indeed, for the ease of the subject and greater dispatch of causes, methods have been found to open all the three superior courts for the redress of private wrongs; which have remedied many inconveniences, and yet preserved the forms and boundaries handed down to us from high antiquity. If facts are disputed, they are sent down to be tried in the country by the neighbours; but the law, arifing upon those facts, is determined by the judges above: and, if they are mistaken in point of law, there remain in both cases two successive courts of appeal, to rectify fuch their mistakes. If the rigour of general rules does in any case bear hard upon individuals, courts of equity are open to fupply the defects, but not fap the fundamentals, of the law. Lastly, there presides over all one great court of appeal, which is the last resort in matters both of law and equity; and which will therefore take care to preferve an uniformity and equilibrium among all the inferior jurisdictions: a court composed of prelates selected for their piety, and of nobles advanced to that honour for their personal merit, or deriving both honour and merit from an illustrious train of ancestors; who are formed by their education, interested by their property, and bound upon their conscience and honour, to be skilled in the laws of their country. This is a faithful fketch of the English juridical constitution, as defigned by the masterly hands of our forefathers. Of which the great original lines are still strong and visible; and, if any of its minuter strokes are by the length of time at all obscured or decayed, they may still be with ease restored to their pristine vigour: and that not fo much by fanciful alterations and wild experiments (so frequent in this fertile age) as by closely adhering to the wisdom of the antient plan, concerted by Alfred and perfected by Edward I; and by attending to the spirit, without neglecting the forms, of their excellent and venerable institutions.

CHAPTER

S

es efy

in

en

he

p-

nd ni-

is:

or of

by

ur, ful

by

eat

or

tine

vild

ad-

fred

irit,

able

TER

CHAPTER THE FIFTH.

OF COURTS ECCLESIASTICAL, MILITARY, AND MARITIME

B ESIDES the feveral courts, which were treated of in the preceding chapter, and in which all injuries are redressed, that fall under the cognizance of the common law of England, or that spirit of equity which ought to be its confant attendant, there still remain some other courts of a jurifdiction equally public and general: which take cognizance of other species of injuries, of an ecclesiastical, military, and maritime nature; and therefore are properly distinguished by the title of ecclesiastical courts, courts military, and courts maritime.

I. BEFORE I descend to consider particular ecclesiastical tourts, I must first of all in general premise, that in the time of our Saxon ancestors there was no sort of distinction between the lay and the ecclesiastical jurisdiction: the county court was as much a spiritual as a temporal tribunal: the ights of the church were ascertained and afferted at the same ime and by the same judges as the rights of the laity. For his purpose the bishop of the diocese, and the alderman, r in his absence the sheriff of the county, used to sit together in the county court, and had there the cognizance of ll causes as well ecclesiastical as civil: a superior deserence eing paid to the bishop's opinion in spiritual matters, and that of the lay judges in temporal (a). This union spower was very advantageous to them both: the prefence

⁽a) Celeberrimo huic con entui episcopus et aldermannus interunto; quorum alter jura divina, alter humanæ populum edoceto. L. Eadgar. c. 5.

K

tic

7h

ea

ti

ela

re

ete

rr

H

iffi

Fe E

(d

In

ifc

nd:

nia d f

91

fcu:

the

ciba

) 2

sence of the bishop added weight and reverence to the sherish proceedings; and the authority of the sherish was equal useful to the bishop, by enforcing obedience to his decrees such refractory offenders, as would otherwise have despite the thunder of mere ecclesiastical censures.

But so moderate and rational a plan was wholly inconfident with those views of ambition, that were then forming by court of Rome. It foon became an established maxim in the papal fystem of policy, that all ecclesiastical persons and a ecclefiaftical causes should be solely and entirely subjects ecclefiaftical jurifdiction only : which jurifdiction was fupped ed to belodged in the first place and immediately in the pop by divine indefeafible right and investiture from Christ him felf; and derived from the pope to all inferior tribunal Hence the canon law lays it down as a rule, that " facerdate " a regibus bonorandi sunt, non judicandi (b):" and places emphatical reliance on a fabulous tale which it tells of them peror Constantine: that when some petitions were brought him, imploring the aid of his authority against certain of bishops, accused of oppression and injustice, he caused (a the holy canon) the petitions to be burnt in their presence, d missing them with this valediction : " Ite, et inter vos can vestras discutite, quia dignum non est ut nos judicemus Deos (

It was not, however, till after the Norman conquest this doctrine was received in England; when William (whose title was warmly espoused by the monasteries, who he liberally endowed, and by the foreign clergy, who he brought over in shoals from France and Italy, a planted in the best preferments of the English church) wat length prevailed upon to establish this fatal encount ment, and separate the ecclesiastical court from the common whether actuated by principles of bigotry, or by those of more refined policy, in order to discountenance the laws of the Edward, abounding with the spirit of Saxon liberty, is altoget

⁽b) Decret. part, 2. cauf. 11. qu. 1. c. 4.

IH

iff

ally

es in

oile

Hen

y th

n th

d al

ppol

pope

him

nals

rdote

ces a

e em

ghti

of h

(fay

e, di

coul

15 (c)

A th

am .

whi

who

y, a

) W

roa0

fe of

is D

geth

id.

together certain. But the latter, if not the cause, was unubtedly the consequence, of this separation: for the Saxon ws were soon overborne by the Norman justiciars, when e county court fell into disregard by the bishop's withdrawghis presence, in obedience to the charter of the Conqueror); which prohibited any spiritual cause from being tried the secular courts, and commanded the suitors to appear fore the bishop only, whose decisions were directed to conrm to the canon law (e).

King Henry the first, at his accession, among other restotions of the laws of king Edward the Confessor, revived
is of the union of the civil and ecclesiastical courts (f).
Thich was, according to fir Edward Coke (g), after the
eat heat of the conquest was past, only a restitution of the
tient law of England. This however was ill relished by
e popish clergy, who, under the guidance of that arrogant
elate archbishop Anselm, very early disapproved of a meare that put them on a level with the profane laity, and substed spiritual men and causes to the inspection of the securmagistrates: and therefore in their synod at Westminster,
Hen. I. they ordained that no bishop should attend the dissistence of the secusistence of the securmagistrates and therefore in their synod at Westminster,
Hen. I. they ordained that no bishop should attend the dissistence of the securmagistrates. And when, upon the death of king Henry the
first,

(d) Hale, Hift. C. L. 102. Selden. in Eadem. p. 6. 1. 24. latt. 259. Wik L.L. Angl. Sax. 292. (e) Nullus iscopus vel archidiaconus de legibus episcopal bus amplius in bunet placita teneant, nec caufam quæ ad regimen animarum pertitad judicium secularium hominum adducant: sed quicunque sendum episcopales leges, de quacunque causa vel culpa interpelafuerit, ad locum, quem ad loc episcopus elegerit et nom: averit, niat; ibique de causa sua respondeat; et non secundum hundret; d secundum canones et episcopales leges, rectum deo et episcopo suo ciat. (f) Volo et præcipio, ut omnes de comitatu eant ad mitatus et bundreda, sicut fecerint tempore regis Edwardi; art. Hen. I. in Spelm. cod. wet. legum. 305) And what is leurely hinted at, is fully explained by his coc'e of laws extant the red book of the exchequer, though in general but of doubtlauthority, cap. 8. Generalio comitatuum placita certis locis et cibus teneantur. Interfint autem episcopi, comites, &c. et aganr primo debita verae christianitatis jura, secundo regis placita, strems causae singulorum dignis satisfactionibus expleantur.) 2 Inft. 70. (h) Ne episcopi sæcularium placitorum offium suscipiant. Spelm. Cod. 301.

h.

ie

ıu

on

ecu

ne nit

rig

ith

e k

lun

sho

hic

pif

om

4.

e co

hes

idst

rifd

ffic

ctio hich

atute

5.

I tet

tabi

the

erog

strati gniz shop

first, the usurper Stephen was brought in and supported by clergy, we find one article of the oath which they impose upon him was, that ecclesiastical persons and ecclesiastic causes should be subject only to the bishop's jurisdiction of And as it was about this time that the contest and emulate began between the laws of England and those of Rome of the temporal courts adhering to the former, and the spirits adopting the latter as their rule of proceeding, this wides the breach between them, and made a coalition afterward impracticable; which probably would else have been effects at the general reformation of the church.

In bri fly recounting the various species of ecclesiastic courts, or, as they are often styled, courts christian, (curi christianitatis) I shall begin with the lowest, and so also gradually to the supreme court of appeal (1).

- whole ecclesiastical polity. It is held in the archdeacon's a sence before a judge appointed by himself, and called his of cial; and its jurisdiction is sometimes in concurrence with sometimes in exclusion of, the bishop's court of the diocel From hence, however, by statute 24 Hen. VIII. c. 12. the lies an appeal to that of the bishop.
- 2. THE confistory court of every diocesan bishop is held their several cathedrals, for the trial of all ecclesiastical cause arising within their respective dioceses. The bishop's charcellor, or his commissary, is the judge; and from his set tence there lies an appeal, by virtue of the same statute, to the archbishop of each province respectively.
- 3. The court of arches is a court of appeal, belonging the archbishop of each province; whereof the judge is call

⁽i) Ibid. 310. (k) See vol. I. introd. §. 1. (l) f farther particulars see Burn's ecclesiastical law, Wood's institute the common law, and Oughton's orde judiciorum.

(i) tio

ic

uria

cen

n th

s al

off

with

cell

the

chan

s fee

oth

ng

calle

tute

e dean of the arches; because he antiently held his court in the nurch of St. Mary le bow (Santta Maria de arcubus) though the principal spiritual courts are now holden at Doctors' ommons. His proper jurisdiction is only over the thirteen eculiar parishes belonging to the archbishop in London; but e office of dean of the arches having been for a long time hited with that of the archbishop's principal official, he now, right of the last mentioned office, receives and determines peals from the fentences of all inferior ecclefiaftical courts ithin the province. And from him there lies an appeal to e king in chancery (that is, to a court of delegates appointlunder the king's great seal) by statute 25 Hen. VIII. c. 19. supreme head of the English church, in the place of the shop of Rome, who formerly exercised this jurisdiction; hich circumstance alone will furnish the reason why the pish clergy were so anxious to separate the spiritual court om the temporal.

4. The court of peculiars is a branch of and annexed to e court of arches. It has a jurisdiction over all those passes dispersed through the province of Canterbury in the idst of other dioceses, which are exempt from the ordinary's risdiction, and subject to the metropolitan only. All ecclessical causes, arising within these peculiar or exempt jurisdions, are, originally, cognizable by this court; from hich an appeal lay formerly to the pope, but now by the atute 25 Hen. VIII. c. 19. to the king in chancery.

5. The prerogative court is established for the trial of l testamentary causes, where the deceased hath lest bona tabilia within two different dioceses. In which case the robate of wills belongs, as we have formerly seen (m), the archbishop of the province, by way of special terogative. And all causes relating to the wills, admissrations, or legacies of such persons are, originally, sprizable herein, before a judge appointed by the archishop, called the judge of the prerogative court; from whom

⁽m) Book II. ch. 32.

d

d

or

d

tai

of

ny ce:

. V

e

A

tec

t c

into

t, a

are

, a

mif

re e

Hen.

, w

lya

HES

; n

e tha defe

ui fio

ed to

ad of

(p)

whom an appeal lies by statute 25 Hen. VIII. c. 19. to king in chancery, instead of the pope as formerly.

I PASS by fuch ecclefiaftical courts, as have only what called a voluntary and not a contentious jurisdiction; who are merely concerned in doing or selling what no one opposed and which keep an open office for that purpose, (as grant dispensations, licences, faculties, and other remnants of papal extortions) but do not concern themselves with admittring redress to any injury; and shall proceed to

6. THE great court of appeal in all ecclefiaftical can viz. the court of delegates, judices delegati, appointed by king's commission under his great seal, and issuing out chancery, to represent his royal person, and hear all appeals him, made by virtue of the before-mentioned flatute Henry VIII. This commission is usually filled with la spiritual and temporal, judges of the courts at Westmin and doctors of the civil law. Appeals to Rome were alw looked upon by the English nation, even in the times popery, with an evil eye; as being contrary to the liberty the subject, the honour of the crown, and the independent of the whole realm: and were first introduced in very bulent times, in the fixteenth year of king Stephen (A. 1151.) at the same period (fir Henry Spelman observes) the civil and canon laws were first imported into England But, in a few years after, to obviate this growing practi the constitutions made at Clarendon, 11. Hen. II. on account of the difturbances raised by archbishop Becket and other lots of the holy see, expressly declare (o), that appeals inca ecclefiaftical ought to lie, from the archdeacon to the dioces from the diocesan to the arch-bishop of the province; and in the archbishop to the king; and are not to proceed any fat without special licence from the crown. But the unhappy vantage that was given in the reigns of king John, and his Henry the third, to the encroaching power of the pope,

ever vigilant to improve all opportunities of extending his diction hither, at length rivetted the custom of appealto Rome in causes ecclesiastical so strongly, that it never
d be thoroughly broken off, till the grand rupture hapd in the reign of Henry the eighth; when all the jurison usurped by the pope in matters ecclesiastical was red to the crown, to which it originally belonged: so that
tatute 25 Hen. VIII. was but declaratory of the antient
of the realm (p). But in case the king himself be party
ny of these suits, the appeal does not then lie to him in
every, which would be absurd; but, by the statute 24.
VIII. c. 12. to all the bishops of the realm, assembled
to appear house of convocation.

A COMMISSION of review is a commission sometimes ted, in extraordinary cases, to revise the sentence of the t of delegates, when it is apprehended they have been into a material error. This commission the king may t, although the statutes 24 & 25 Hen. VIII. before cited, are the sentence of the delegates definitive: because the , as supreme head by the canon law, used to grant such mission of review; and such authority, as the pope here-re exerted, is now annexed to the crown (q) by statutes len. VIII. c. 1. and 1 Eliz. c. 1. But it is not a matter of t, which the subject may demand ex debito justitiae; but the smatter of favour, and which therefore is often denied.

HESE are now the principal courts of ecclesiastical jurisdicinone of which are allowed to be courts of record: no ethan was another much more formidable jurisdiction, but deservedly annihilated, viz. the court of the king's high instantial in causes ecclesiastical. The court was erected and ed to the regal power (r) by virtue of the statute in Eliz.c.i. ad of a larger jurisdiction which had before been exercised in the pope's authority. It was intended to vindicate the dignity

te

lon

nft

WZ

105

rty

den

T

A.

) th

d (a

cou

caul ceia

dfm

art

py a

119

⁽p) 4 Inft. 341.

⁽q) Ibid.

⁽r) 4 Inft. 324.

of

alt

de

91

al

co

cle

far

ha

ng

VI

ffi

t.

hi

e

e f

er

rt

1'9

e i

2

uı

ea

0

V

la

0

or er

dignity and peace of the church, by reforming, ordering correcting the ecclesiastical state and persons, and all most of errors, heresies, schisms, abuses, offences, contempts, enormities. Under the shelter of which very general means were found, in that and the two succeeding reign vest in the high commissioners extraordinary and almost spotic powers, of fining and imprisoning; which they end much beyond the degree of the offence itself, and frequency over offences by no means of spiritual cognizance. For reasons this court was justly abolished by statute 16 Car.

11. And the weak and illegal attempt that was made to vive it, during the reign of king James the second, so only to hasten that infatuated prince's ruin.

II. NEXT, as to the courts military. The only con this kind known to, and established by, the permanent of the land, is the court of chivalry, formerly held before lord high constable and earl marshal of England jointly fince the attainder of Stafford duke of Buckingham, Henry VIII. and the consequent extinguishment of the of lord high constable, it hath usually, with respect to matters, been held before the earl marshal only (s). court, by statute 13 Ric. II. c. 2. hath cognizance of cont and other matters touching deeds of arms and war, as out of the realm as within it. And from its fentences a peal lies immediately to the king in person (t). This was in great reputation in the times of pure chivalry, and terwards during our connexions with the continent, by territories which our princes held in France: but is now g almost entirely out of use, on account of the feebleness jurisdiction, and want of power to enforce its judgment it can neither fine nor imprison, not being a court of record

III. THE maritime courts, or fuch as have power and idention to determine all maritime injuries, arising upon the

⁽s) 1 Lev. 230. Show. Parl. Cas. 60. (t) 4 Inst. 125. Mod. 127.

001

ng

ots, I w eign

mol

ex

equ

For Car.

de to

COU

ent

efor

ntly;

m, I

theo Et to

).

cont

, as

ces at

hiso

y, and

t, by

ow gr

ness a

ment

ecord

and j

on the

5.

arts out of the reach of the common law, are only the of admiralty, and its courts of appeal. The court of alty is held before the lord high admiral of England, deputy, who is called the judge of the court. Acg to fir Henry Spelman (w), and Lambard (x), it was all erected by king Edward the third. Its proceedings cording to the method of the civil law, like those of lefiaffical courts; upon which account it is usually held fame place with the fuperior ecclefiaftical courts, at s' Commons in London. It is no court of record, any han the spiritual courts. From the sentences of the adyjudge an appeal always lay, in ordinary course, to ng in chancery, as may be collected from statute 25 VIII. c. 19. which directs the appeal from the archscourts to be determined by persons named in the king's flion, "like as in case of appeal from the admiralty t." But this is also expressly declared by statute 8 Eliz. hich enacts that upon appeal made to the chancery, the te definitive of the delegates appointed by commission e final.

PEALS from the vice-admiralty courts in America, and er plantations and settlements, may be brought before irts of admiralty in England, as being a branch of the I's jurisdiction, though they may also be brought beeking in council. But in case of prize vessels, taken of war, in any part of the world, and condemned in urts of admiralty or vice-admiralty as lawful prize, eal lies to certain commissioners of appeals, consisting of the privy council, and not to judges delegates. And virtue of divers treaties with foreign nations; by which ar courts are established in all the maritime countries ope for the decision of this question, whether lawful r not: for this being a question between subjects erent states, it belongs entirely to the law of natind not to the municipal laws of either country, to me it. The original court, to which this question is permitted

⁽w) Gloff. 13.

tl

1

r

at

on ut

S

hn

erd, hen erd litte b) hair or (c) fort

permitted in England, is the court of admiralty; and then of appeal is in effect the king's privy council, the member which are, in consequence of treaties, commissioned the great feal for this purpose. In 1748, for the more in determination of appeals, the judges of the courts of W minster-hall, though not privy counsellors, were added to commission then in being. But doubts being conceived cerning the validity of that commission, on account of addition, the same was confirmed by statute 22 Geo. II. with a proviso, that no sentence given under it should be lid, unless a majority of the commissioners present actually privy counsellors. But this did not, I appre extend to any future commissions; and such an addition came indeed wholly unnecessary in the course of the which commenced in 1756; fince, during the wholed war, the commission of appeals was regularly attended all its decisions conducted by a judge, whose masterly acqu ance with the law of nations was known and revered by state in Europe (y).

(y) See the Sentiments of the president Montesquieu, in Vattel (a subject of the king of Prussia) on the answer trass by the English court to his Prussian majesty's Exposition due of c. A. D. 1753. (Montesquieu's letters. 5 Mar. 1753. Vadroit de gens. 1. 2. c. 7. §. 84.)

CHAP

artl

the distribution of consultations de constitutions

die einste de de la company de

CHAPTER THE SIXTH.

t

cqu

by e

es m

COURTS OF A SPECIAL JURISDICTION.

only was decide; corrly defermed if contain may refer to the contain may refer to the holder by the contains the contains

of the Hall of the flore by dulling will the classe of the solution of the sol

the two preceding chapters we have confidered the fevel courts, whose jurisdiction is public and general; and h are so contrived that some or other of them may admiredress to every possible injury that can arise in the kingat large. There yet remain certain others, whose jurison is private and special, confined to particular spots, or uted only to redress particular injuries. These are,

THE forest courts, instituted for the government of the soforests in different parts of the kingdom, and for the shment of all injuries done to the king's deer or venison, to vert or greenswerd, and to the covert in which such are lodged. These are the courts of attachments, of the of sweinmote, and of justice-feat. The court of attachments, avood-mote, or forty days court, is to be held before erderors of the forest once in every forty days (a); and stituted to enquire into all offenders against vert and venib): who may be attached by their bodies, if taken with mainour (or mainoeuvre, a manu) that is, in the very act lling venison or stealing wood, or preparing so to or by fresh and immediate pursuit after the act is (c); else they must be attached by their goods. And in forty days court the foresters or keepers are to bring in

Cart. de forest. 9. Hen. III. c. 8. arth. 79.

(b) 4 Inft. 289.

n

01

ı

ro

ny

h

en

Hen

er

ot

arl

ort

ras

nce

ille

II

iffi

y v ierl

row

th

verl

ean

here

unt

ime.

ne an

eir (

ay ta Voi

(I) S

) Ibi

d G

their attachments, or presentments de viridi et venatione; a the verderors are to receive the fame, and to enroll them, a to certify them under their feals to the court of justice-fe or sweinmote (d): for this court can only enquire of, but convict offenders. 2. The court of regard, or survey of don is to be holden every third year, for the lawing or expeditable of mastiffs, which is done by cutting off the claws of the for feet, to prevent them from running after deer (e). No oth dogs but mastiffs are to be thus lawed or expeditated, form other were permitted to be kept within the precincts of forest; it being supposed that the keeping of these, and the only, was necessary for the defence of a man's house (f). The court of sweinmote is to be holden before the verderor as judges, by the fleward of the sweinmote thrice in en year (g), the sweins or freeholders within the forest composit the jury. The principal jurisdiction of this court is, first, enquire into the oppressions and grievances committed by officers of the forest; " de super-oneratione forestariorum, " aliorum ministrorum forestae; et de eorum oppressionibus " pulo regis illatis:" and, fecondly, to receive and try fentments certified from the court of attachments again offences in vert and venison (h). And this court may only enquire, but convict also, which conviction shall certified to the court of justice-seat under the seals of the justicefor this court cannot proceed to judgment (i). But the prin pal court is, 4. The court of justice-seat, which is held bet the chief justice in eyre, or chief itinerant judge, capital justitiarius in itinere, or his deputy; to hear and determ all trespasses within the forest, and all claims of franchi liberties, and privileges, and all pleas and causes whatlor therein arising (k). It may also proceed to try pres ments in the inferior courts of the forests, and to give ju ment upon conviction of the sweinmote. And the chief jul may therefore, after presentment made or indictment four

⁽d) Cart. de forest. c. 16. (e) Ibid. c. 6. (f) 4 Infl.)
(g) Cart. de forest. c. 8. (h) Stat. 34 Edw. I. c. 1, (i) 4
289. (k) 4 Infl. 291.

oth

).

eron

oof

rft,

y t

m,

y P

agai

ay i

hall jur

prin befo

apita

erm

the

refe

e jud

fjuff

fou

nft. 3

1) 41

ut not before (1), iffue his warrant to the officers of the forest o apprehend the offenders. It may be held every third year; nd forty days notice ought to be given of its fitting. This ourt may fine and imprison for offences within the forest (m), being a court of record: and therefore a writ of error lies fom hence to the court of king's bench, to rectify and redress ny mal-administrations of justice (n); or the chief justice nevre may adjourn any matter of law into the court of king's ench (o). These justices in eyre were instituted by king Jenry II. A. D. 1184 (p); and their courts were formerly ery regularly held: but the last court of justice seat of any ote was that holden in the reign of Charles I. before the arl of Holland; the rigorous proceedings at which are reorted by fir William Jones. After the restoration another as held, pro forma only, before the earl of Oxford (q); but nce the aera of the revolution in 1688, the forest laws have allen into total difuse, to the great advantage of the subject.

II. A SECOND species of private courts, is that of comissioners of sewers. This is a temporary tribunal, erected y virtue of a commission under the great seal; which forerly used to be granted pro re nata at the pleasure of the town (r), but now at the descretion and nomination of the rd chancellor, lord treasurer, and chief justices, pursuant the statute 23 Hen. VIII. c. 5. Their jurisdiction is to erlook the repairs of fea banks and fea walls; and the eansing of rivers, public streams, ditches, and other conduits, hereby any waters are carried off: and is confined to fuch unty or particular district as the commission shall expressly ame. The commissioners are a court of record, and may he and imprison for contempts (s); and in the execution of eir duty may proceed by jury, or upon their own view, and ay take order for the removal of any annoyances, or the fafe-VOL. III. guard

⁽¹⁾ Stat. 1 Edw. III. c. 8. 7 Ric. II. c. 4. (m) 4 Inst. 313.) Ibid. 297. (o) Ibid. 295. (p) Hoveden. (q) North's life of d Guildford. 45. (r) F. N. B. 113. (s) 1 Sid. 145.

66

44

"

66

66

yea

of:

tion

cha

the

law whi

fati

mar

with

uri

don,

to fu

no fi

ind

wher

houg

nvef

vitne tingo

West

(y) 2. §.

guard and conservation of the sewers within their committee either according to the laws and customs of Romney-mark (t), or otherwise at their own discretion. They may all affels fuch rates, or fcots, upon the owners of lands with their district, as they shall judge necessary: and, if any perfon refuses to pay them, the commissioners may levy the same by diftress of his goods and chattels; or they may, by flatur 23 Hen. VIII. c. 5. fell his freehold lands (and by the 7 Ann. c. 10. his copyhold also) in order to pay such scots or affest ments. But their conduct is under the control of the cour of king's bench, which will prevent or punish any illegal or tyrannical proceedings (u). And yet in the reign of king James I. (8 Nov. 1616.) the privy council took upon thema order, that no action or complaint should be profecuted again the commissioners, unless before that board; and committed feveral to prison who had brought such actions at common law till they should release the same; and one of the reasons for discharging fir Edward Coke from his office of lord chief justice was for countenancing those proceedings (v). The pretence for which arbitrary measures was no other than the tyrant's plea (w), of the necessity of unlimited powers in works of evident utility to the public, "the fupreme reason about " all reasons, which is the salvation of the kings lands and " people." But now it is clearly held, that this (as well as all other inferior jurisdictions) is subject to the discretionary concion of his majesty's court of king's bench (x).

III. THE court of policies of assurance, when subsisting, is erected in pursuance of the statute 43 Eliz. c. 12. which recite the immemorial usage of policies of assurance, "by means where of it cometh to pass, upon the loss or perishing of any ship, then so followed."

⁽t) Romney-marsh, in the county of Kent, a tract containing 24000 acres, is governed by certain antient and equitable laws of sewers, composed by Henry de Bathe a venerable judge in the reign of king Henry the third; from which laws all commissioner of sewers in England may receive light and direction. (4 Inst. 276. (u) Cro. Jac. 336. (v) Moor. 825, 826. See pag. 54. (w) Milk Parad. Lost. iv. 393. (x) 1 Ventr. 66. Salk. 146.

urt

1 to

inft

ted

law

for

hief The

orks

and

sall

:061-

g, is

cites

nere-

there

weth

aining

ws of

oner 276.

Mil

" followeth not the undoing of any man, but the loss lighteth " rather eafily upon many than heavy upon few, and rather up-" on them that adventure not, than upon those that do adven-" ture; whereby all merchants, especially those of the younger " fort, are allured to venture more willingly and more freely: " and that heretofore fuch affurers had used to stand so justly and " precifely upon their credits, as few or no controversies had " arisen thereupon; and if any had grown, the same had from " time to time been ended and ordered by certain grave and dif-" creet merchants appointed by the lord mayor of the city of " London; as men by reason of their experience fittest to un-" derstand and speedily decide those causes:" but that of late years divers persons had withdrawn themselves from that course of arbitration, and had driven the affured to bring separate actions at law against each affurer: it therefore enables the lord chancellor yearly to grant a standing commission to the judge of the admiralty, the recorder of London, two doctors of the civil aw, two common lawyers, and eight merchants; any three of which, one being a civilian or a barrifter, are thereby and by the fatute 13 & 14 Car. II. c. 23. empowered to determine in a fummary way all causes concerning policies of affurance in London, with an appeal (by way of bill) to the court of chancery. But the urisdiction being somewhat defective, as extending only to Lonion, and to no other affurances but those on merchandize (y) and ofuits brought by the affured only and not by the infurers (z), ofuch commission has of late years issued: butinfurance causes renowufually determined by the verdict of a jury of merchants, and the opinion of the judges, in case of any legal doubts; whereby the decision is more speedy, satisfactory, and final: bough it is to be wished, that some of the parliamentary powers nvested in these commissioners, especially for the examination of vitnesses, either beyond the seas or speedily going out of the ingdom (a), could at present be adopted by the courts of Westminster-hall, without requiring the consent of parties.

D 2 IV. THI

⁽y) Styl. 166. (z) 1 Show. 396. (a) Stat. 13 & 14 Car. II. c. 2. 9. 3 & 4.

3

xt hi

ty

he

6.

y t

he f

uno

1 fe

ffic

pro on

dgn kir

rits

nin

(k) i

IV. THE court of the marshalfea, and the palace court at West. minster, though two distinct courts, are frequently confounded together. The former was originally holden before the steward and marshal of the king's house, and was instituted to adminiter justice between the king's domestic servants, that they might not be drawn into other courts, and thereby the king lose their fervice (b). It was formerly held in, though not a part of, the and regis (c); and, when that was subdivided, remained a distinct jurisdiction: holding plea of all trespasses committed within the verge of the court, where only one of the parties is in the king's domestic service (in which case the inquest shall be taken by a jury of the country) and of all debts, contracts and ovenants, where both of the contracting parties belong to the royal houshold; and then the inquest shall be composed of men of the houshold only (d). By the statute of 13Ric. II. st. 1.c.3. (in affirmance of the common law) (e) the verge of the court in this respect extends for twelve miles round the king's place of refidence (f). And, as this tribunal was never subject to the jurisdiction of the chief justiciary, no writ of error lay from it (though a court of record) to the king's bench, but only to parliament (g), till the statutes of 5 Edw. III. c. 2. and 10 Edw. III. ft. 2. c. 3. which allowed fuch writ of error before the king in his place. But this court being ambulatory, and obliged to follow the king in all his progresses, so that by the removal of the houshold, actions were frequently discontinued (h), and doubts having arisen as to the extent of its jurisdiction (i), king Charles I. in the fixth year of his reign, byhi letters patent erected a new court of record, called the curia po latii or palace court, to be held before the steward of the houshold

⁽b) 1 Bulstr. 211. (c) Flet. 1. 2. c. 2. (d) Artic. sup. cast. 28. Edw. I. c. 3. Stat. 5 Edw. III. c. 2. 10. Edw. III. st. 2. c. 1. (e) 2 Inst. 548. (f) By the antient Saxon constitution, the parregia, or privilege of the king's palace, extended from his palace gate to the distance of three miles, three furlongs, three acres nine feet, nine palms, and nine barley corns; as appears from fragment of the textus Roffensis, cited in Dr. Hickes's different epistol. 114. (g) 1 Bulstr. 211. 10 Rep. 79. (h) F. N. B. 246 2 Inst. 548. (i) 1 Bulstr. 208.

I.

A-

ed

rd

of-

ht

eir

ula

ju-

the

the

ken

co-

the

nen

. 3.

ourt lace

A to

rom y to

d 10 efore

and

t by

onti-

y his

a pashold

and

cart

. C. 4

e pax

palace

acres

Tertal.

and knight marshal, and the steward of the court, or his deputy; with jurisdiction to hold plea of all manner of personal actions whatfoever, which shall arise between any parties within twelve miles of his majefty's palace at Whitehall (k). The court s now held once a week, together with the antient court of marshalsea, in the borough of Southwark: and a writ of error ies from thence to the court of king's bench. But, if the cause s of any enfiderable confequence, it is usually removed on ts first commencement, together with the custody of the defendant, either into the king's bench or common pleas by a writ of habeas corpus cum causa: and the inferior business of he court hath of late years been much reduced, by the new ourts of conscience erected in the environs of London; in onfideration of which the four counsel belonging to these ourts had falaries granted them for their lives by the statute 3 Geo. II. c. 27.

V. A FIFTH species of private courts of a limited, though atensive jurisdiction, are those of the principality of Wales; hich upon its thorough reduction, and the fettling of its poty in the reign of Henry the eighth (1), were erected all over he country; principally by the statute 34 & 35 Hen. VIII. c. 6. though much had before been done, and the way prepared y the statute of Wales, 12 Edw. I. and other statutes. By testatute of Henry the eighth before-mentioned, courts-baron, undred, and county courts are there established as in England. fession is also to be held twice in every year in each couny, by judges appointed by the king, to be called the great. effions of the several counties in Wales: in which all pleas real and personal actions shall be held, with the same form. process, and in as ample a manner, as in the court of comon pleas at Westminster: and writs of error shall lie from dgments therein (it being a court of record) to the court king's bench at Westminster. But the ordinary original rits or process of the king's courts at Westminster do not ninto the principality of Wales (m); though process of exe-D 3 cution ...

⁽k) 1 Sid. 180. Salk. 439. (1) See Vol. I. introd. §. 4. (m) 2.

o Bi

hi

16

in

he eti

nu

DIT

att

he

om

nd

er

he o

s t

ov. Vin

o fi

alat

ne k

om

ie c

ourt

err

eme

rved

nd a

a, ce

all

at the

ng (

m) I

7. 1 S ft. 38

cution does (n): as do also all prerogative write, as write of certiorari, quo minus, mandamus, and the like (o). And even in causes between subject and subject, to prevent injustice through family factions and prejudices, it is held lawful (in causes of freehold at least, if not in all others) to bring an action in the English courts, and try the same in the next English county adjoining to that part of Wales where the cause arises (p).

VI. The court of the duchy chamber of Lancaster is another special jurisdiction, held before the chancellor of the duchy or his deputy, concerning all matter of equity relating to lands holden of the king in right of the duchy of Lancaster (q): which is a thing very distinct from the county palatine, and comprizes much territory which lies at a vast distance from it; as particularly a very large district surrounded by the city of Westminster. The proceedings in this court are the same as on the equity side in the courts of exchequer and chancery (r); so that it seems not to be a court of records and indeed it has been holden that those courts have a concurrent jurisdiction with the duchy court, and may take cognizance of the same causes (s).

VII. ANOTHER species of private courts, which are of a limited local jurisdiction, and have at the same time an exclusive cognizance of pleas, in matters both of law and equivalent (t), are those which appertain to the counties palatine of Chester, Lancaster, and Durham, and the royal franchise of Ely (u). In all these, as in the principality of Wales, the king's ordinary writs, issuing under the great seal out of chancery, do not run; that is, they are of no force. For, as originally all jura regalia were granted to the lorded these counties palatine, they had of course the sole adminssion of justice, by their own judges appointed by themselve and not by the crown. It would therefore be incongruous

⁽n) 2 Bulst. 156. 2 Saund. 193. Raym. 206. (o) Cro. Jac. 484 (p) Vaugh. 413. Hardr. 66. (q) Hob. 77. 2 Lev. 24. (r) 4 lat. 206. (s) 1 Chan. Rep. 55. Toth. 145. Hardr. 171. (t) 4 lat. 213. 218. Finch. R. 452. (u) See vol. I. introd. § 4.

for the king to fend his writ to direct the judge of another's ourt in what manner to administer justice between the suitors. But, when the privileges of these counties palatine and franhises were abridged by statute 27 Hen. VIII. c. 24. it was lo enacted, that all writs and process should be made in the ing's name, but should be teffe'd or witnessed in the name of : he owner of the franchise. Wherefore all writs, whereon ctions are founded, and which have current authority here, nust be under the seal of the respective franchises; the two ormer of which are now annexed to the crown, and the two atter under the government of their several bishops. And he judges of affife, who fit therein, fit by virtue of a special ommission from the owners of the several franchises, and nder the feal thereof; and not by the usual commission uner the great seal of England. Hither also may be referred he courts of the cinque ports, or five most important havens, s they formerly were esteemed, in the kingdom; viz. lover, Sandwich, Romney, Hastings, and Hythe; to which Vinchelsea and Rye have been since added: which have alfimilar franchises in many respects (w) with the counties alatine, and particularly an exclusive jurisdiction (before the layor and jurats of the ports) in which exclusive jurisdiction he king's ordinary writ does not run. A writ of error lies om the mayor and jurats of each port to the lord warden of e cinque ports, in his court of Shepway; and from the ourt of Shepway to the king's bench (x). And so too a writ error-lies from all the other jurisdictions to the same sureme court of judicature (y), as an enfign of fuperiority rewed to the crown at the original creation of the franchises. . nd all prerogative writs (as those of babeas corpus, prohibitin, certiorari, and mandamus) may iffue for the same reason all these exempt jurisdictions (z); because the privilege, atthe king's writ runs not, must be intended between party. d party; for there can be no fuch privilege against the ng (a).

he

nd

d:

n-

g.

of a

exnity

e of

hife

les,

out

rce.

Isof

ini-

elve

uous

for

484

Int.

VIII. THE D 4

w) 1 Sid. 166. (x) Jenk. 71. Dyversite des courts. t. bank le 9. 1 Sid. 356. (y) Bro. Abr. t. error. 74. 101. Davis. 62. 4., 1. 38. 214. 218. (z) 1 Sid. 92. (a) Cro. Jac. 543.

e

re

re

he

it

ic

nin

fi

he

om

hor

he

B

arl

ulo

our

ılaı

c

ese

eni

owe l co

pla

nft

vice

e o

ay, ch c

ce.

ess

ade:

ve

urts

y of

VIII. The stanary courts in Devonshire and Cornwall, for the administration of justice among the tinners therein, are also courts of record, but of the same private and exclusive nature. They are held before the lord warden and his fublish tutes, in virtue of a privilege granted to the workers in the tin-mines there, to fue and be fued only in their own courts, that they may not be drawn from their business, which is highly profitable to the public, by attending their lawfuits in other courts (b). The privileges of the tinners are confirmed by charter, 33 Edw. I. and fully expounded by a private statute, 50 Edw. III. which (c) has fince been explained by a public act, 16 Car. I. c. 15. What relates to our present purpose is only this: that all tinners and labourers in and about the ftannaries shall, during the time of their working therein b. na fide, be privileged from fuits of other courts, and be only impleaded in the stannary court in all matters, excepting pleas of land, life, and member. No writ of error list from hence to any court in Westminster-hall; as was agreed by all the judges (d) in 4 Jac. I. But an appeal lies from the fleward of the court to the under-warden; and from him to the lord-warden; and thence to the privy council of the prince of Wales, as duke of Cornwall (e), when he hathhad livery or investiture of the same (f). And from thence the appeal lies to the king himself, in the last resort (g).

IX. THE feveral courts within the city of London (h), and other cities, boroughs, and corporations throughout the kingdom, held by prescription, charter, or act of parliament, are also the same private and limited species. It would exceed the design

⁽b) 4 Inst. 232. (c) See this at length in 4 Inst. 232. (d) 4 Inst. 231. (e) Ibid. 230. (f) 3 Busst. 183. (g) Dode ridge hist. of Cornw. 94. (h) The chief of these in London and the sheriffs courts, holden before their steward or judge; from which a writ of error lies to the court of hustings, before the mayor, to corder, and sheriffs; and from thence to justices appointed by the king's commission, who used to sit in the church of St. Marin le grand. (F. N. B. 32.) And from the judgment of those justices a writ of error lies immediately to the house of lords.

nly

ies

eed

the

1 to

the

had

the

and

ing.

foot

elign

and

(d)

)ode.

n are which

, re-

y the

fartin e juland compass of our present enquiries, if I were to enter into a particular detail of these, and to examine the nature and exent of their several jurisdictions. It may in general be sufficient to say, that they arose originally from the favour of the rown to those particular districts, wherein we find them rected, upon the same principle that hundred-courts, and he like, were established; for the convenience of the inhabitants, that they might prosecute their suits, and receive jutice at home: that, for the most part, the courts at West-ninster-hall have a concurrent jurisdiction with these, or else superintendency over them (i): and that the proceedings, in hese special courts, ought to be according to the course of the ommon law, unless otherwise ordered by parliament; for hough the king may erect new courts, yet he cannot alter he established course of law.

Bur there is no species of courts, constituted by act of arliament, in the city of London, and other trading and poulous districts, which in its proceedings so varies from the burse of the common law, that it may deserve a more partilar confideration. I mean the courts of requests, or courts conscience, for the recovery of small debts. The first of ese was established in London, so early as the reign of enry the eighth, by an act of their common council; which owever was certainly insufficient for that purpose and illegal, confirmed by statute 3 Jac. I. c. 15. which has fince been plained and amended by statute 14 Geo. II. c. 10. The infitution is this: two aldermen, and four commoners, fit vice a week to hear all causes of debt not exceeding the vae of forty shillings; which they examine in a summary ay, by the oath of the parties or other witnesses, and make ch order therein as is consonant to equity and good conscice. The time and expence of obtaining this fummary reess are very inconsiderable, which make it a great benefit to ade: and thereupon divers trading towns and other districts ve obtained acts of parliament, for establishing in them urts of conscience upon nearly the same plan as that in the y of London.

D 5

THE

u

n

re

nui

he

njo

ver

riv

vhe.

niv

ithe

o th

eral

onf

na:

T

e di

ourt

ind

THE anxious defire, that has been shewn to obtain the feveral acts, proves clearly that the nation in general is trule fensible of the great inconvenience arising from the difuse of the antient county and hundred-courts; wherein causes of this fmall value were always formerly decided, with very little trouble and expense to the parties. But it is to be feared, that the general remedy which of late hath been principally applied to this inconvenience, (the erecting these new juris dictions) may itself be attended in time with very ill confequences: as the method of proceeding therein is entirely it derogation of the common law; as their large discretionary powers create a petty tyranny in a fet of standing commission. ers; and as the difuse of the trial by jury may tend to estrange the minds of the people from that valuable prerogative of Englishmen, which has already been more than sufficiently excluded in many instances. How much rather is it to h wished, that the proceedings in the county and hundred courts could again be revived, without burthening the free holders with too frequent and tedious attendances; and atth fame time removing the delays that have infensibly crept into their proceedings, and the power that either party haved transferring at pleasure their suits to the courts at Westmifter! And we may with fatisfaction observe, that this exp riment has been actually tried, and has succeeded in the po pulous county of Middlesex; which might serve as an example for others. For by statute 23 Geo. II. c. 33. it is enach ed, 1. That a special county court shall be held, at least one a month in every hundred of the county of Middlesex, by county clerk. 2, That twelve freeholders of that hundred qualified to ferve on juries, and struck-by the sheriff, shall fummoned to appear at such court by rotation; so as nor shall be summoned oftener than once a year. 3. That in a causes, not exceeding the value of forty shillings, the coun clerk and twelve fuitors shall proceed in a summary way, er mining the parties and witnesses on oath, without the form process antiently used; and shall make such order therein as the shall judge agreeable to conscience. 4. That no plaints shall

remova

d,

ly

í.

ſe.

ary

ORnge

of

ntly

be

·edree-

tthe

into

re of

nin-

xpe-

e po-

cam-

nact-

ond

y th

dred

allb

non in a

ount

, exa

orma

sthe

hallb move emoved out of this court, by any process whatsoever; but the etermination herein shall be final. 5. That if any action be rought in any of the superior courts against a person resident n Middlesex, for a debt or contract, upon the trial whereof he jury shall find less than 40s. damages, the plaintiff shall ecover no costs, but shall pay the defendant double costs; mless upon some special circumstances, to be certified by the udge who tried it. 6. Lastly, a table of very moderate fees. s prescribed and set down in the act; which are not to be xceeded upon any account whatfoever. This is a plan enirely agreeable to the constitution and genius of the nation: alculated to prevent a multitude of vexatious actions in the uperior courts, and at the same time to give honest creditors n opportunity of recovering small sums; which now they ne frequently deterred from by the expense of a suit at law: plan which, in short, wants only to be generally known, in rder to its universal reception.

X. THERE is yet another species of private courts, which I nust not pass over in silence: viz. chancellor's courts in he two universities of England. Which two learned bodies njoy the fole jurisdiction, in exclusion of the king's courts, ver all civil actions and fuits whatfoever, where a scholar or rivileged person is one of the parties; excepting in such cases where the right of freehold is concerned. And these by the miverfity charter they are at liberty to try and determine, ither according to the common law of the land, or according o their own local customs, at their discretion : which has geerally led them to carry on their process in a course much onformed to the civil law, for reasons sufficiently explained n a former volume (k). .

THESE privileges were granted, that the students might not e distracted from their studies by legal process from distant ourts, and other forensic avocations. And privileges of this and are of very high antiquity, being generally enjoyed by all

foreign

n

co

r

pe

or f

s)

era

er c

(9

foreign univerfities as well as our own, in consequence (I ap. prehend) of a conftitution of the emperor Frederick, A. D. 1158 (1). But as to England in particular, the oldest charter that I have feen, containing this grant to the university of Oxford was 28 Hen. III. A. D. 1244. And the same privi leges were confirmed and enlarged by almost every fucceeding prince, down to king Henry the eighth; in the fourteenth year of whose reign the largest and most extensive charter of all was granted. One fimilar to which was after. wards granted to Cambridge in the third year of queen Elizabeth. But yet, notwithstanding these charters, the privile ges granted therein, of proceeding in a course different fromthe law of the land, were of fo high a nature, that they were held to be invalid; for though the king might erect new courts, yet he could not alter the course of law by his letter patent. Therefore in the reign of queen Elizabeth an act of parliament was obtained (m), confirming all the charters of the two universities, and those of 14 Hen. VIII. and 3 Eliz Which bleffed act, as fir Edward Coke entitles it (n) established this high privilege without any doubt or opposition (o): or, as fir Mathew Hale (p) very fully expresses the fense of the common law and the operation of the act of parliament, " although king Henry the eighth, 14 A. R. Mi granted to the university a liberal charter, to proceed at " cording to the use of the university; viz. by a court " much conformed to the civil law; yet that charter had " not been sufficient to have warranted such proceeding " without the help of an act of parliament. And therefore " in 13 Eliz. an act passed, whereby that charter was in ef-" fect enacted; and it is thereby that at this day they have " a kind of civil law procedure, even in matters that are of " themselves of common law cognizance, where either of " the parties is privileged." THIS

⁽¹⁾ Cod. 4. tit. 13. (m) 13 Eliz. c. 29. (n) 4 Inft. 21/ (o) Jenk. Cent. 2. pl. 88. Cent. 3. pl. 33. Hardr. 504. God bolt. 201. (p) Hift. C. L. 33.

re

WS

ers

of

of

liz.

it

ofi-

the par-

fui, acourse had ings efore n efhave are of

THIS

. 227 God This privilege, so far as it relates to civil causes, is exercised at Oxford in the chancellor's court; the judge of which is the vice-chancellor, his deputy, or affessor. From his sentence an appeal lies to delegates appointed by the congregation; from thence to other delegates of the house of convocation; and if they all three concur in the same sentence, it is final, at least by the statutes of the university (q), according to the rule of the civil law (r). But, if there be any distordance or variation in any of the three sentences, an appeal lies in the last resort to judges delegates, appointed by the trown under the great seal in chancery.

I HAVE now gone through the several species of private, or pecial courts, of the greatest note in the kingdom, instituted or the local redress of private wrongs; and must, in the close of all, make one general observation from sir Edward Coke:

(s) that these particular jurisdictions, derogating from the general jurisdiction of the courts of common law, are ever taken trictly, and cannot be extended farther than the express leter of their privileges will most explicitly warrant.

(q) Tit. 21. §. 19. (r) Cod. 7. 70. 1. (s) 2 Inft. 548.

iff

om

the

8 C

erh ng

bok

aw (

ifdia

mp

ourt

ome

HA

onfic

I. 7

ourts uals ;

form

nimae

rivate

keof

(a)

CHAPTER THE SEVENTHA

OF THE COGNIZANCE OF PRIVATE WRONGS

WE are now to proceed to the cognizance of private wrongs; that is, to confider in which of the value variety of courts, mentioned in the three preceding chapters, every possible injury that can be afforded to a man's personal property is certain of meeting with redress.

THE authority of the several courts of private and special jurisdiction, or of what wrongs such courts have cognizance, was necessarily remarked as those respective tribunals were enumerated; and therefore need not be here again repeated which will confine our present enquiry to the cognizance of civil injuries in the several courts of public or general jurisdiction. And the order, in which I shall pursue this enquiry will be by shewing; 1. What actions may be brought or what injuries remedied, in the ecclesiastical courts 2. What in the military. 3 What in the maritime, And 4. What in the courts of common law.

AND, with regard to the three first of these particulars, must be gleave not so much to consider what hath at any time been claimed or pretended to belong to their jurisdiction, by the officers and judges of those respective courts, but what the common law allows and permits to be so. For these eccentrical to bunals (which are principally guided by the rules of the impersand canon laws) as they subsist and are admitted in England, in

1.01

cial

nce,

vere

ted:

e of

1117

ght

urts

rs,

tim y th

com

altri perit

by any right of their own (a), but upon bare sufferance and oleration from the municipal laws, must have recourse to he laws of that country wherein they are thus adopted, to e informed how far their jurisdiction extends, or what causes re permitted, and what forbidden, to be discussed or drawn n question before them. It matters not therefore what the pandects of Justinian, or the decretals of Gregory have orlained. They are here of no more intrinsic authority than he laws of Solon and Lycurgus: curious perhaps for their miquity, respectable for their equity, and frequently of admirable use in illustrating a point of history. Nor is it at all naterial in what light other nations may confider this matter fjurifdiction. Every nation must and will abide by its own nunicipal laws; which various accidents conspire to render ifferent in almost every country in Europe. We permit ome kinds of fuits to be of ecclefiaftical cognizance, which ther nations have referred entirely to the temporal courts; s concerning wills and fuecessions to intestates' chattels: and erhaps we may, in our turn, prohibit them from interferig in some controversies, which on the continent may be loked upon as merely spiritual. In short, the common aw of England is the one uniform rule to determine the juidiction of courts: and, if any tribunals whatsoever atmpt to exceed the limits so prescribed them, the king's ourts of common law may and do prohibit them; and in ome cases punish their indges (b).

HAVING premised this general caution, I proceed now to

I. THE wrongs or injuries cognizable by the ecclesiastical purts. I mean such as are offered to private persons or indiviuals; which are cognizable by the ecclesiastical court, not for formation of the offender himself or party injuring (prosalute nimae, as immoralities in general are, when unconnected with rivate injuries) but such as are there to be prosecuted for the ke of the party injured, to make him a satisfaction and redress

⁽a) See vol. I. introd. §. 1. (b) Hal. Hift. C. L. c, 2.

r

u.

atı

ak

ra do

ur fit

qu

ica

ch uch

y.

all

. II

ano

end

pou

ANO

rts,

gy; atfoe rriage tries

for the damage which he has fustained. And these I shall reduce under the three general heads; of causes pecuniar, causes matrimonial, and causes testamentary.

r. PECUNIARY causes, cognizable in the ecclesiastical courts, are such as arise either from the withholding ecclesiastical dues, or the doing or neglecting some act relating to the church, whereby some damage accrues to the plaintist; to wards obtaining a satisfaction for which he is permitted to institute a suit in the spiritual court.

THE principal of these is the subtraction or withholding of tithes from the parfon or vicar, whether the former be a clegyman or a lay oppropriator (c). But herein a distinction must be taken: for the ecclesiastical courts have no jurisdiction to try the right of tithes unless between spiritual persons (d) but in ordinary cases, between spiritual men and lay men, are only to compel the payment of them, when the right's not disputed (e). By the statute or rather writ (f) of circumspecie agatis (g), it is declared that the court christian shall not be prohibited from holding plea, " fi rector petat versu es parochianos oblationes et decimas debitas et consuetas:" 6 that if any dispute arises whether such tithes be due and accept tomed, this cannot be determined in the ecclefiaftical count, but before the king's courts of the common law; as fuch queltion affects the temporal inheritance, and the determination must bind the real property. But where the right does not come into question, but only the fatt, whether or no the tithes allow ed to be due be really subtracted or withdrawn, this is a trans ent personal injury, for which the remedy may properly be ha in the spiritual court; viz. the recovery of the tithes, or the equivalent. By statute 2 & 3 Edw. VI. c. 13, it is enacted, this if any person shall carry off his praedial tithes (viz. of corn, han or the like) before the tenth part is duly fet forth, or agreement

⁽c) Stat. 32 Hen. VIII. c. 7. (d) 2 RoII. Abr. 309, 310

Bro. Abr. 1. jurisdiction. 85. (e) 2 Inst. 364, 489, 49

(f) See Barrington. 120. 3 Pryn. Rec. 336. (g) 13 Edit

I. st. 4. or rather, 9 Edw. II.

en,

17/1-

12]

r fu

cuf-

urt

nel-

tion

ome

low-

anfi-

e had their

, that , hay,

ement

9, 310 , 490 Bein

made with the proprietor, or shall willingly withdraw his thes of the same, or shall stop or hinder the proprietor of ne tithes, or his deputy from viewing or carrying them away; ch offender shall pay double the value of the tithes, with ofts, to be recovered before the ecclefiastical judge, accordg to the king's ecclefiaftical laws. By a former clause of the me statute, the treble value of the tithes, so subtracted or ithheld, may be fued for in the temporal courts, which is uivalent to the double value to be fued for in the ecclefiasti-I. For one may fue for and recover in the ecclefiaftical urts the tithes themselves, or a recompence for them, by e antient law; to which the fuit for the double value is furadded by the statute. But as no suit lay in the temporal urts for the subtraction of tithes themselves, therefore the tute gave a treble forfeiture, if fued for there; in order to ake the court of justice uniform, by giving the same reration in one court as in the other (h). However it now dom happens that tithes are fued for at all in the spiritual urts: for if the defendant pleads any custom, modus, comfition, or other matter whereby the right of tithing is called question, this takes it out of the jurisdiction of the ecclesiical judges: for the law will not suffer the existence of th a right to be decided by the sentence of any single, uch less an ecclesiastical judge, without the verdict of a y. But a more fummary method than either of recovering all tithes under the value of 40s. is given by statute 7 & 8 .III. c. 6. by complaint to two justices of the peace: and, another statute of the same year (i), the same remedy is tended to all tithes withheld by quakers under the value of pounds.

ANOTHER pecuniary injury, cognizable in the spiritual rts, is the non-payment of other ecclesiastical dues to the gy; as pensions, mortuaries, compositions, offerings, and atsoever falls under the denomination of surplice-fees, for riages or other ministerial offices of the church: all which tries are redressed by a decree for their actual payment.

Befides

ic

li

t;

in

ro

ni

to

an

bif

ml

al o

the

anc

OR

er v

cha ongi

rt by

itn

ving

e go ther

n tir

) F.

ev. 26

Besides which all offerings, oblations, and obventions, mexceeding the value of 40s. may be recovered in a summary way, before two justices of the peace (i). But care must be taken that these are real and not imaginary dues; for, if they be contrary to the common law, a prohibition will issue of the temporal courts to stop all suits concerning them. As where a fee was demanded by the minister of the parish summary to the baptism of a child, which was administed in another place (k); this, however authorized by the canon, is contrary to common right: for of common right no fee is due to the minister even for performing such branches of his duty and it can only be supported by a special custom (1); but no custom can support the demand of a fee without performing them at all.

For fees also, settled and acknowleged to be due to be officers of the ecclesiastical courts, a suit will lie therein: but not if the right of the fees is at all disputable; for then it must be decided at the common law (m). It is also said, that is curate be licenced, and his salary be appointed by the bishop and he be not paid, the curate hath a remedy in the ecclesiastical court (n): but if he be not licenced, or hath no sud salary appointed, or hath made a special agreement with the rector, he must sue for a satisfaction at common law (0); there by proving such special agreement, or else by leavings to a jury to give damages upon a quantum meruit; that is, consideration of what he reasonably deserved in proportion to the service performed.

UNDER this head of pecuniary injuries may also be redected the several matters of spoliation, dilapidations, and neglet of repairing the church and things thereunto belonging; to which satisfaction may be sued for in the ecclesiastical court.

SPOLIATION is an injury done by one clerk or incumber to another, in taking the fruits of his benefice without any ne thereum

⁽i) Stat. 7 & 8 W. III. c. 6: (k) Saik 233. (l) M 334. Lord Raym. 450. 1558. Fitzg. 55. (m) 1 Ventr. 19 (n) 1 Burn. eccl. law. 438. (o) 1 Freem. 70.

rt.

1110

165

ercunto, but under a pretended title. It is remedied by a cree to account for the profits so taken. This injury, when jus patronatus or right of advowson doth not come in dete, is cognizable in the spiritual court: as if a patron first efents A to a benefice, who is instituted and inducted there-; and then, upon pretence of a vacancy, the same patron fents B to the same living, and he also obtains institution dinduction. Now if A disputes the fact of the vacancy. n that clerk who is kept out of the profits of the living. ichever it be, may fue the other in the spiritual court for liation, or taking the profits of his benefice. And it shall re be tried, whether the living were, or were not, vait; upon which the validity of the second clerk's pretensismust depend (o). But if the right of patronage comes at into dispute, as if one patron presented A, and another ron presented B, there the ecclesiastical court hath no mizance, provided the tithes fued for amount to a fourth tof the value of the living, but may be prohibited at the ance of the patron by the king's writ of indicavit (p). So. if a clerk, without any colour of title, ejects another m his parsonage, this injury must be redressed in the temal courts: for it depends upon no question determinable the spiritual law, (as plurality of benefices or no plurality, ancy or no vacancy) but is merely a civil injury.

for dilapidations, which were a kind of ecclesiastical waste, the voluntary, by pulling down; or permissive, by suffering chancel, parsonage-house, and other buildings thereunto onging, to decay; an action also lies, either in the spiritual of the the canon law, or in the courts of common law (q): it may be brought by the successor against the predecessor, wing, or, if dead, then against his executors. It is also said be good cause of deprivation, if the bishop, parson, vicar, other ecclesiastical person, dilapidates the buildings, or cuts on timber growing on the patrimony of the church, unless,

⁾ F. N. B. 36. (p) Circumspette agatis; 13 Edw. I. st. Iric. Cleri. 9 Edw. II. c. 2. F. N. B. 45. (q) Cart. 224.

8

a

ly

ly

an

po

pro

er nib

ca

es,

Fr

ouse

ts o

reb

e.

ie fi

ma

joir

ren

not

racte

t, t

uch

ntire

Son

mon

for necessary repairs (r): and that a writ of prohibition walso lie against him in the courts of common law (s). In statute 13 Eliz. c. 10. if any spiritual person makes over alienates his goods, with intent to defeat his successors of the remedy for dilapidations, the successor shall have such remed against the alience, in the ecclesiastical court, as if is were the executor of his predecessor. And by statute 14 Eliz. c. 11. all money recovered for dilapidations shall with two years be employed upon the buildings, in respect where it was recovered, on penalty of forfeiting double the value the crown.

As to the neglect of reparations of the church, church yar and the like, the spiritual court has undoubted cognizant hereof (s); and a suit may be brought therein for non-pament of a rate made by the church-wardens for that pupper And these are the principal pecuniary injuries, which a cognizable, or for which suits may be instituted, in the a clesiastical courts.

2. MATRIMONIAL causes or injuries respecting the right of marriage, are another, and a much more undiffund branch of the ecclefiastical jurisdiction. Though, if consider marriages in the light of mere civil contracts, the do not feem to be properly of spiritual cognizance (t). I the Romanists having very early converted this contract in a holy facramental ordinance, the church of course took under her protection, upon the division of the two jurisdid ons. And, in the hands of fuch able politicians, it foot came an engine of great importance to the papal scheme an univerfal monarchy over Christendom. The numbers canonical impediments that were invented, and occasional dispensed with, by the holy see, not only enriched the com of the church, but gave it a vast ascendant over princes. all denominations; whose marriages were fanctified or repr bated, their iffue legitimated or bastardized, and the succession to their thrones established or rendered precarious, according

(t) Waib. alliance, 173.

⁽r) 1 Roll. Rep. 86. 11 Rep. 98 Godb. 259. (f) 3 Rep. 158. 1. Roll. Rep. 335. (s) Circumspecte agatis. 5 Rep. (c) We be ellipseed as a second second

t in

ook

m b

nall

ces A

repre

ceffic

ing

Bull ep. 6

humour or interest of the reigning pontiff: besides a thoud nice and difficult scruples, with which the clergy of fe ages puzzled the understandings and loaded the connces of the inferior orders of the laity; and which could v be unravelled by these their spiritual guides. Yet, ab-Red from this universal influence, which affords so good afon for their conduct, one might otherwise be led to wonthat the fame authority, which enjoined the strictest bacy to the priesthood, should think them the proper res in causes between man and wife. These causes indeed, ly from the nature of the injuries complained of, and ly from the clerical method of treating them (v), foon ame too gross for the modesty of a lay tribunal. And causes rimonial are now so peculiarly ecclesiastical, that the poral courts will never interfere in controversies of this , unless in some particular cases. As if the spiritual court proceed to call a marriage in question after the death of er of the parties; this the courts of common law will libit, because it tends to bastardize and disinherit the iffue; cannot so well defend the marriage, as the parties thems, when both of them living, might have done (u).

Is matrimonial causes, one of the first and principle is, sous jastitationis matrimonii; when one of the parties its or gives out that he or she is married to the other, reby a common reputation of their matrimony may be. On this ground the party injured may libel the other me spiritual court; and, unless the defendant undertakes makes out a proof of the actual marriage. he or she is joined perpetual silence upon that head; which is the remedy the ecclesiastical courts can give for this injury. Mother species of matrimonial causes, was when a party racted to another brought a suit in the ecclesiastical to to compel a celebration of the marriage in pursuance such contract; but this branch of causes is now cut smirely by the act for preventing clandestine marriages, 26 Geo. II.

Some of the impurest books, that are now extant in any lan-, are those written by the popish clergy on the subjects of mony and divorce. (u) 2 Inst. 614.

b

L

ar

op

or

ye

ica

mu

ne g

At (

bfe

ngl

a

re,

, 21

m"

gni

testi

mer

er (

Wa

licke

76. (p. 38.

26 Geo. II. c. 33. which enacts, that for the future not shall be had in any ecclesiastical court, to compel a celebra of marriage in facie ecclesiae, for or because of any contrat matrimony whatsoever. 3. The suit for restitution of com rights is also another species of matrimonial causes: which brought whenever either the husband or wife is guilty of injury of fubtraction, or lives separate from the other will any fufficient reason; in which case the ecclesiastical juid tion will compel them to come together again, if either pa be weak enough to defire it, contrary to the inclination the other. 4. Divorces also, of which and their for distinctions we treated at large in a former volume (w), causes thoroughly matrimonial, and cognizable by the ed aftical judge. If it becomes improper, through some suppoper, venient cause arising ex post facto, that the parties should together any longer; as through intolerable cruelty, adult a perpetual disease, and the like; this unfitness or inab for the marriage state may be looked upon as an injury the fuffering party; and for this the ecclefiaftical law a nisters the remedy of separation, or a divorce a mensa et the But if the cause existed previous to the marriage, was fuch a one as rendered the marriage unlawful ab as confanguinity, corporal imbecility, or the like; in case the law looks upon the marriage to have been alw null and void, being contracted in fraudem legis, and dem not only a feparation from bed and board, but a vin matrimonii itself. 5. The last species of matrimonial a is a consequence drawn from one of the species of vorce, that a menfa et thoro; which is the fuit for alm a term which fignifies maintenance: which suit the wife case of separation, may have against her husband, if he glects or refuses to make her an allowance suitable to station in life. This is an injury to the wife, and the christian will redress it by assigning her a competant man ance, and compelling the husband by ecclefiaftical census pay it. But no alimony will be affigned in case of a di for adultery on her part; for as that amounts to a forfeith

tell vet eis, sies war (w). Book I, ch. 15. craft his end

. 7.

alw

ecra

cal

of alim

he

tot

dower after his death, it is also a sufficient reason why should not be partaker of his estate when living.

onging to the ecclefiastical jurisdiction; which, as they are tainly of a mere temporal nature (x), may seem at first wa little oddly ranked among matters of a spiritual cognice. And indeed (as was in some degree observed in a forrvolume) (y) they were originally cognizable in the king's rts of common law, viz. the county courts (z); and afterds transferred to the jurisdiction of the church by the our of the crown, as a natural consequence of granting to bishops the administration of intestates' effects.

THIS spiritual jurisdiction of testamentary causes is a pear constitution of this island; for in almost all other (even opish) countries all matters testamentary are of the jurison of the civil magistrate. And that this privilege is yed by the clergy in England, not as a matter of eccleical right, but by the special favour and indulgence of municipal law, and as it should seem by some public act ne great council, is freely acknowleged by Lindewood, the It canonist of the fifteenth century. Testamentary causes, bserves, belong to the ecclesiastical courts " de confuetudine ngliae, et super consensu regio et suorum procerum in talibus antiquo concesso (a)." The fame was, about a century re, very openly professed in a canon of archbishop Stratviz. that administration of intestates goods was " ab m" granted to the ordinary, " confensu regio et magnatum gni Angliae (b). " The constitutions of cardinal Othobon tellify, that this provision " olim a praelatis cum approbame regis et baronum dicitur emanasse (c)." And archbishop er (d), in queen Elizabeth's time, affirms in express words,

Warburt. alliance. 173. (y) Book II. ch. 32. lickes, Differ. Epistolar. pag. 8. (a) Provincial l. 3. 1. 13. 76. (b) Ibid. l. 3. 1. 8. 38. fol, 263. (c) cap. 23. (d) See 1.38.

pa

he

e

S

uí

his

fer

vio

vef

ng

fat

cleft

ijun

onec

ents

and

fo ac

d le

TH

in t

(1) C

ites et

meliu

ttelt.

(p) St

that originally in matters testamentary "non ullam babeba "episcopi authoritatem, praeter eam quam a rege accepta "referebant. Jus testamenta probandi non babebant: alm "nistrationis potestatem cuique delegare non poterant.

AT what period of time the ecclefiaftical jurisdiction of taments and intestacies began in England, is not ascertain by any antient writer: and Lindewode (e) very fairly confe fes, " cujus regis temporibus boc ordinatum sit, non reperis We find it indeed frequently afferted in our common la books, that it is but of late years that the church hath had probate of wills (f). But this must only be understood mean, that it hath not always had this prerogative : for a tainly it is of very high antiquity. Lindewode, we have he declares that it was " ab antiquo." Stratford, in the reign king Edward III. mentions it as " ab olim ordinatum;" cardinal Othobon, in the 52 Hen. III. speaks of it as an a ent tradition. Bracton holds it for clear law in the a reign of Henry III. that matters testamentary belonged to spiritual court (g). And, yet earlier, the disposition of in tates' goods "per vifum ecclefiae" was one of the articles of firmed to the prelates by king John's magna carta (h). M thew Paris also informs us, that king Richard I. ordained Normandy, " quod diffributio rerum quae in testamento to " quuntur autoritate ecclefiae fiet." And even this ordina of king Richard, was only an introduction of the same into his ducal dominions, which before prevailed in this his dom: for in the reign of his father Henry II. Glanvil is press, that " fi quis aliquid dixerit contra testamentum, place " illud in curia christianitatis audiri debet et terminari And the Scots book called regiam majestatem agrees verb with Glanvil in this point (k).

It appears that the foreign clergy were pretty early ambibiof this branch of power: but their attempts to assume it on

⁽e) Fol. 263. (f) Fitz. Abr. tit. testament. pl. 2 l. Abr. 217. 9 Rep. 37. Vaugh. 207. (g) l. 5. de exceptime c. 10. (h) Cap. 27. edit. Oxon. (i) l. 7. c. 8. (k) l. 38.

and far tother into sea Ma

ned

inan inan ie k is e

lacit

rba

bitio

on

COL

tioni

ontinent were effectually curbed by the edict of the emperor uftin (1), which restrained the infinuation or probate of staments (as formerly) to the office of the magister census: which the emperor fubjoins this reason; " absurdum etenim clericis est, immo etiam opprobriosum, si peritos se velint offendere disceptationum effe forensium." But afterwards by e canon law (m) it was allowed, that the bishop might comel by ecclesiastical censures the performance of a bequest to ous uses. And therefore, that being considered as a cause uae secundum canones et episcopales leges ad regimen animarum ertinuit, it fell within the jurisdiction of the spiritual courts the express words of the charter of King William I. which parated those courts from the temporal. And afterwards, hen king Henry I. by his coronation-charter directed, that e goods of an intestate should be divided for the good of s foul (n), this made all intestacies immediately spiritual uses, as much as a legacy to pious uses had been before. his therefore, we may probably conjecture, was the aera ferred to by Stratford and Othobon, when the king by the lvice of the prelates, and with the consent of his barons, vested the church with this privilege. And accordingly in ng Stephen's charter it is provided, that the goods of an infate ecclefiastic shall be distributed pro salute animae ejus, defiae confilio (0); which latter words aree quivalent to per fum ecclefiae in the great charter of king John before-menmed. And the Danes and Swedes (who received the rudients of christianity and ecclesiastical discipline from Enand about the beginning of the twelfth century) have thence lo adopted the spiritual cognizance of intestacies, testaments, nd legacies (p).

THIS jurisdiction, we have seen, is principally exercised with in the consistory courts of every diocesan bishop, and in the Vol. III.

⁽¹⁾ Cod. 1. 3. 41. (m) Decretal. 3. 26. 17. Gilb. Rep. 204, 5. (n) Si quis baronum seu hominum meorum—pecuniam am non dederit wel dare disposuerit, uxor sua, sive liberi, aut pates et legitimi homines ejus, eam pro anima ejus dividant, sicus melius wisum suerit. (Text Rossens. c. 34. p. 51. (o) Lord ttelt. Hen. II. vol. 1. 536. Hearne ad Gul, Neubr. 711. (p) Stiernhook, de jure Sueon. l. 3. c. 8.

I

tl

ai ti

of

al

pr

th

th

kr

prerogative court of the metropolitan, originally; and in the arches court and court of delegates by way of appeal. It divisible into three branches; the probate of wills, the grant ing of administrations, and the suing for legacies. The two former of which, when no opposition is made, are grante merely ex officio et debito justitiae, and are then the objet of what is called the voluntary, and not the contentious juil But when a caveat is entered against proving the will, or granting administration, and a fuit thereupon follow to determine either the validity of the testament, or wh hath a right to the administration; this claim and obstruction by the adverse party are an injury to the party entitled, as as fuch are remedied by the fentence of the spiritual count either by establishing the will or granting the administration Subtraction, the withholding or detaining, of legacies is all ftill more apparently injurious, by depriving the legatess that right, with which the laws of the land, and the will the deceased have invested them and therefore, as a const quential part of testamentary jurisdiction, the spiritual com administers redress herein," by compelling the executor to m them. But in this last case the courts of equity exercise concurrent jurisdiction with the ecclesiastical courts, as ind dent to some other species of relief prayed by the complainant as to compel the executor to account for the testator's effect or affent to the legacy, or the like. For, as it is beneath dignity of the king's courts to be merely ancillary to other inferior jurisdictions, the cause, when once brought the receives there also its full determination.

THESE are the principal injuries, for which the part grieved either must, or may, seek his remedy in the spirits courts. But before I entirely dismiss this head, it may not improper to add a short wor'd concerning the method of processing in these tribunals, with regard to the redress of injuris

It must (in the first place) be acknowleded, to the honour the spiritual courts, that though they continue to this day

ries.

day

deci

decide many questions which are properly of temporal cognizance, yet justice is in general so ably and impartially administred in those tribunals, (especially of the superior kind) and the boundaries of their power are now so well known and established, that no material inconvenience at present arises from this jurisdiction still continuing in the antient chanel. And, should an alteration be attempted, great consusion would probably arise, in overturning long established forms, and new-modelling a course of proceedings that has now prevailed for seven centuries.

THE establishment of the civil law process in all the ecclefiaftical courts was indeed a mafter-piece of papal discernment, as it made a coalition impracticable between them and thenational tribunals, without manifest inconvenience and hazard. And this confideration had undoubtedly its weight in caufing this measure to be adopted, though many other causes concurred. The time when the pandects of Justinian were discovered afresh and rescued from the dust of antiquity, the eagerness with which they were studied by the popish ecclesiastics, and the consequent dissensions between the clergy and the laity of England, have formerly (q) been spoken to at large. Ishall only now remark upon those collections, that their being written in the Latin tongue, and referring so much to the will of the prince and his delegated officers of justice, sufficiently recommended them to the court of Rome, exclusive of their intrinsic merit. To keep the laity in the darkest ignorance. and to monopolize the little science, which then existed, entirely among the monkish clergy, were deep-rooted principles of papal policy. And, as the bishops of Rome affected in all points to mimic the imperial grandeur, as the spiritual prerogatives were moulded on the pattern of the temporal, fo the canon law process was formed on the model of the civil law: the prelates embracing with the utmost ardor a method of judicial proceedings, which was carried on in a language unknown to the bulk of the people, which banished the inter-F. 2 vention

re

iı

fie

Ser

an

ter

da

fec?

for

rati

grea

excl

he

hefe

udg f w

n ac

e in

H

na

r pro

iere e

etty

ords

use.

(t) C

vention of a jury (that bulwark of Gothic liberty) and which placed an arbitrary power of decision in the breast of a single man.

THE proceedings in the esclesiastical courts are therefore regulated according to the practice of the civil and canon laws; or rather according to a mixture of both, corrected and new-modelled by their own particular usages, and the interposition of the courts of common law. For, if the proceedings in the spiritual court be ever so regularly consonant to the rules of the Roman law, yet if they be manifestly repugnant to the fundamental maxims of the municipal laws, to which upon principles of found policy the ecclefiaftical process ought in every state to conform (r); (as if they require two witnesses to prove a fact, where one will suffice at common law) in fuch cases a prohibition will be awarded against them But, under these restrictions, their ordinary course of proceeding is; first, by citation, to call the party injuring before them. Then by libel, libellus, a little book, or by articles drawn out in a formal allegation, to fet forth the complainant's ground of complaint. To this fucceeds the defendant's answer upon oath; when, if he denies or extenuates the charge, they proceed to proofs by witnesses examined, and their depositions taken down in writing, by an officer of the If the defendant has any circumstances to offer in his defence, he must also propound them in what is called his defensive allegation, to which he is entitled in his turn to the plaintiff's answer upon oath, and may from thence proceed to proofs as well as his antagonist. The canonical doctrine of purgation, whereby the parties were obliged to answer upon oath to any matter, however criminal, that might be objected against them, (though long ago overruled in the court of chancery, the genius of the English law having broken through the bondage imposed on it by its clerical chancellors, and afferted the doctrines of judicial as well as civil liberty) continued till the middle of the last century to be upheld by the spiritual courts; when the legislature was obliged to interpose, to teach them a lesson of similar moderation. By the ftatute |

⁽r) Warb. alliance. 179.

⁽s) 2 Roll. Abr. 300. 302.

f

.

.

1-

es

nd

he

us

his

he

to of

100

ted

t of

ken

ors,

ty)

the

ter-

tute

statute of 13 Car. II. c. 12. it is enacted, that it shall not be lawful for any bishop or ecclesiastical judge, to tender or administer to any person whatsoever, the oath usually called the oath ex officio, or any other oath whereby he may be compelled to confess, accuse, or purge himself of any criminal matter or thing, whereby he may be liable to any censure or punishment. When all the pleadings and proofs are concluded, they are referred to the consideration, not of a jury, but of a single judge; who takes information by hearing advocates on both sides, and thereupon forms his interlocutory decree or definitive sentence at his own discretion; from which there generally lies an appeal, in the several stages mentioned in a former chapter (t); though, if the same be not appealed from in sisteen days, it is final, by the statute 25 Hen. VIII. c. 19.

But the point in which these jurisdictions are the most defective, is that of enforcing their sentences when pronounced; for which they have no other process, but that of excommunication: which is described (u) to be twofold; the less and the greater excommunication. The less is an ecclesiastical censure, excluding the party from the participation of the sacraments: the greater proceeds farther, and excludes him not only from these, but also from the company of all Christians. But, if the udge of any spiritual court excommunicates a man for a cause of which he hath not the legal cognizance, the party may have an action against him at common law, and he is also liable to the indicted at the suit of the king (w).

HEAVY as the penalty of excommunication is, confidered a ferious light, there are, notwithstanding, many obstinate throstigate men, who would despise the brutum fulmen of here ecclesiastical censures, especially when pronounced by a esty surrogate in the country, for railing or contumelious ords, for non-payment of sees, or costs, or for other trivial susce. The common law therefore compassionately steps in to their

⁽t) Chap. 5. (u) Co. Litt. 133. (w) 2 Inft. 623.

m

ilit

are

cos

ou

the

con

San

W C

as tl

lfuc

all,

e m

orth

onsec

TH

this

y as To

their aid, and kindly lends a supporting hand to an otherwise tottering authority. Imitating herein the policy of our British ancestors, among whom, according to Caesar (x), whoever were interdicted by the Druids from their facrifices, "in " numero impiorum ac sceleratorum habentur: ab iis omnes dece-" dunt, aditum eorum sermonemque defugiunt, ne quid ex contagi-" one incommodi accipiant : neque iis petentibus jus redditur, neque " bonos ullus communicatur." And fo with us by the common law an excommunicated person is disabled to do any act, that is required to be done by one that is probus et legalis homo. He cannot ferve upon juries, cannot be a witness in any court, and, which is the worst of all, cannot bring an action, either real or personal, to recover lands or money due to him (y). Nor is this the whole: for if, within forty days after the sentence has been published in the church, the offe ider does not submit and abide by the fentence of the spiritual court, the bishop may certify such contempt for the king in chancery. Upon which there issues out a writ to the sheriff of the county, called from the bishop's certificate, a fignificavit; or from its effect a writ de excommunicate capiendo: and the sheriff shall thereupon take the offender, and imprison him in the county goal, till he is reconciled to the church, and fuch reconciliation certified by the bishop; upon which another writ, de excommunicato deliberando, iffues out of chancery to deliver and release him (z). This process seems founded on the charter of separation (so often referred to) of William the Conqueror. "Si aliquis per superbiam elatus ad justitiam " episcopalem venire noluerit vocetur semel, secundo, et tertio: quod " finec fic ad emendationem venerit, excommunicetur; et fiopusfu-" erit, ad boc vindicandum fortitudo et justitia regis sive vicer-" mitis adbibeatur." And in case of subtraction of tithes, a more fummary and expeditious affiftance is given by the flatutes of 27 Hen. VIII. c. 20. and 32 Hen. VIII. c. 7. which enact, that upon complaint of any contempt or misbehaviour to the ecclefiaftical judge by the defendant in any fuit for tithes, any privy counsellor or any two justices of the peace (or,

⁽x) De bells Gall, 1. 6. (y) Litt. §. 201. (z) F. N. B. 63.

e

of

15

.

111

04

4-

0-

re

of

he

or,

case of disobedience to a definitive sentence, any two jusces of the peace may commit the party to prison without bail mainprize, till he enters into a recognizance with fufficient reties to give due obedience to the process and sentence of These timely aids, which the common and statute w have lent to the ecclefiaftical jurisdiction, may serve to fute that groundless notion which some are too apt to enterin, that the courts of Westminster-hall are at open variance iththose at Doctor's Commons. It is true that they are somemes obliged to use a parental authority, in correcting the ceffes of these inferior courts, and keeping them within eir legal bounds; but, on the other hand, they afford them a arental affiftance, in repreffing the infolence of contumaciis delinquents, and refcuing their jurisdiction from that conmpt, which for want of fufficient compulfive powers would: herwise be sure to attend it.

II. I AM next to consider the injuries cognizable in the court illitary, or court of chivalry. The jurisdiction of which is deared by statute 13 Ric. II. c. 2. to be this; "that it hath cognizance of contracts touching deeds of arms and of war, out of the realm, and also of things which touch war within the realm, which cannot be determined or discussed by the common law; together with other usages and customs to the same matters appertaining." So that wherever the common we can give redress, this court hath no jurisdiction: which as thrown it entirely out of use as to the matters of contracts, lsuch being usually cognizable in the courts of Westminsterall, if not directly, at least by siction of law: as if a contract to made at Gibraltar, the plaintiss may suppose it made at orthampton; for the locality, or place of making it, is of no unsequence with regard to the validity of the contract.

THE words, "other usages and customs," support the claim this court, 1. To give relief to such of the nobility and geny as think themselves aggrieved in matters of honour; and Tokeep up the distinction of degrees and quality. Whence

at

lat eft

eci

vh

ter

T

iry

tne

ing

urt

tio

lli

dy

reg

nly

lity

ght

t-ai

eive

t the

gdo

h ma

ch to

S W

he a

ed th

Com

it follows, that the civil jurisdiction of this court of chivalny is principally in two points; the redressing injuries of honour, and correcting encroachments in matters of coat-armour, precedency, and other distinctions of families.

As a court of honour, it is to give fatisfaction to all fud as are aggrieved in that point; a point of nature fo nice and delicate, that its wrongs and injuries escape the notice of the common law, and yet are fit to be redreffed formewhere. Such for instance, as calling a man coward, or giving him the lye; for which, as they are productive of no immediate damaget his person or property, no action will lie in the courts at Westminster: and yet they are such injuries as will promot every man of spirit to demand some honourable amends. which by the antient law of the land was appointed to be given in the court of chivalry (a). But modern resolutions havede termined, that how much foever fuch a jurisdiction may be expedient, yet no action for words will lie at present therein (b). And it hath always been most clearly holden (c), that as this court cannot meddle with any thing determinable by the common law, it therefore can give no pecuniary satisfaction or damages; inasmuch as the quantity and determination thereof is ever of common law cognizance. And therefore this court of chivalry can at most order reparation in point of honour; as, to compel the defendant mendacium sibi ipsi imponere, or to take the lie that he has given upon himself, orto make fuch other fubmission as the laws of honour may require (d). Neither can this court, as to the point of reparation in honour, hold plea of any fuch word, or thing, wherein the party is relieved by the courts of the common law. As if a man gives another a blow, or calls him thief or murderer; for in both these cases the common law has pointed out his proper remedy by action.

⁽a) Year book, 37 Hen. VI. Selden of duels, c. 10. Hal. Hist. C. L. 37. (b) Salk. 533. 7 Mod. 125. 2 Hawk. P.C. 16. (c.) Hal. Hist. C. L. 37. (d) 1 Roll. Abr. 128.

h. 7.

n

on

of

0-

re

in

he 2

r; nis

As

11.

As to the other point of its civil jurisdiction, the redressing incroachments and usurpations in matters of heraldry and at-armour; it is the business of this court, according to fir atthew Hale, to adjust the right of armorial ensigns, bearings, efts, supporters, pennons, &c. and also rights of place or ecedence, where the king's patent or act of parliament which cannot be overruled by this court) have not already termined it.

THE proceedings in this court are by petition, in a fumary way; and the trial not by a jury of twelve men, but by messes, or by combat (e). But as it cannot imprison, not ing a court of record, and as by the resolution of the superior urts it is now confined to fo narrow and restrained a juris tion, it has fallen into contempt and disuse. The marlling of coat-armour, which was formerly the pride and dy of all the best families in the kingdom, is now greatly regarded; and has fallen into the hands of certain officers lattendants upon this court, called heralds, who confider nly as a matter of lucre and not of justice: whereby fuch fity and confusion have crept into their records, (which ght to be the standing evidence of families, descents, and t-armour) that, though formerly some credit has been paid their testimony, now even their common seal will not be eived as evidence in any court of justice in the kingdom (f). their original vifitation-books, compiled when progreffes e folemnly and regularly made into every part of the gdom, to enquire into the state of families, and to register hmarriages and descents as were verified to them upon oath, allowed to be good evidence of pedigrees (g). And it is ch to be wished, that this practice of visitation at certain pe-Is were revived; for the failure of inquisitions post mortem, he abolition of military tenures, combined with the neglice of the heralds in omitting their usual progresses, has rened the proof of a modern descent, for the recovery of an es-

tate

Co. Litt. 261 ... Comb. 63.

⁽f) Roll, Abr. 686. 2 Jon. 224.

00

m be

co:

de

cor

gar

lan

ha

Exc

an

We

ouc

hath

whi

han

lleg

11 6

himf

dop

n ba

parer

ex c

o ha

vere

(m)

o) H aw, 1 5.18

of an antient. This will be indeed remedied for the future, with respect to claims of peerage, by a late standing order (h) of the house of lords, directing the heralds to take exact accounts and preserve regular entries of all peers and peeressed England, and their respective descendants; and that an exact pedigree of each peer and his family shall, on the day of his first admission, be delivered to the house by garter, the principal king at arms. But the general inconvenience, affecting more private successions, still continues without a remedy.

III. INJURIES cognizable by the courts maritime, or admiralty courts, are the next object of our enquiries. These courts have jurisdiction and power to try and determine all maritime causes, or such injuries which, though they are in their nature of common law cognizance, yet being committed on the high feas, out of the reach of our ordinary courts of justice, an therefore to be remedied in a peculiar court of their own, All admiralty causes must be therefore causes arising wholk upon the fea, and not within the precincts of any county (1) For the statute 13 Ric. II. c. 5. directs that the admiral and his deputy shall not meddle with any thing, but only things done upon the fea; and the statute 15 Ric. II. c. 3. de clares, that the court of the admiral hath no manner of or nizance of any contract, or of any other thing, done with in the body of any county, either by land or by water nor of any wreck of the sea: for that must be cast of land before it becomes a wreck (i). But it is otherwised things flot sam, jetsam, and ligan; for over them the admin hath jurisdiction, as they are in and upon the sea (k). If parte any contract, or other cause of action, doth arise upon their and part upon the land, the common law excludes the admini court from its jurisdiction; for, part belonging properly to ou cognizance and part to another, the common or general lawtate place of the particular (1). Therefore though pure maritiment

⁽h) 1 t May, 1767. (j) Co. Litt. 260. Hob. 79. (i) \$ book I. ch. 8. (k) 5 Rep. 106. (l) Co. Litt. 261.

h

quisitions, which are earned and become due on the high seas, as seamens' wages, are one proper object of the admiralty jurisdiction, even though the contract for them be made upon land (m); yet, in general, if there be a contract made in England and to be executed upon the seas, as a charter party or covenant that a ship shall sail to Jamaica, or shall be in such a latitude by such a day; or a contract made upon the sea to be performed in England, as a bond made on shipboard to pay money in London, or the like; these kind of mixed contracts belong not to the admiralty jurisdiction, but to the courts of common law (n). And indeed it hath been farther holden, that the admiralty court cannot hold plea of any contract under seal (o).

AND also, as the courts of common law have obtained a concurrent jurisdiction with the court of admiralty with regard to foreign contracts, by supposing them made in Engand; fo it is no uncommon thing for a plaintiff to feign hat a contract, really made at fea, was made at the Royal; Exchange, or other inland place, in order to draw the cogniance of the fuit from the courts of admiralty to those of Westminster-hall (p). This the civilians exclaim against oudly, as inequitable and abfurd; and fir Thomas Ridley (q) hath very gravely proved it to be impossible for the ship in which such cause of action arises to be really at the Royal Exhange in Cornhill. . But our lawyers justify this fiction, by lleging as before, that the locality of fuch contracts is not at Il effential to the merits of them: and that learned civilian imself seems to have forgotten how much such fictions are dopted and encouraged in the Roman law: that a fon killed n battle is supposed to live for ever for the benefit of his parents (r); and that, by the fiction of postliminium and the ex cornelia, captives, when freed from bondage, were held a have never been prisoners (s), and fuch as died in captivity were supposed to have died in their own country (t).

WHERE :

⁽m) 1 Ventr. 146. (n) Hob. 12. Hal. Hist. C. L. 35. 0) Hob. 212. (p) 4 Inst. 134. (q) View of the civil aw, b. 3. p. 1. §. 3. (r) Inst. 1. tit. 25. (e) Ff. 49. 5. 18. §. 6. (t) Ff. 49. 15. 18.

r

ie

10

e

fs

I

vt

ef

at

1,

n

ce

I

nie ai

ect

bfe

iha

rly

nic

urt ch

cid

1.

nec

pro

lere

ien

aw:

1]

WHERE the admiral's court hath not original jurisdiction of the cause, though there should arise in it a question that is proper for the cognizance of that court, yet that doth no alter nor take away the exclusive jurisdiction of the common law (v). And so vice versa, if it hath jurisdiction of the original it hath also jurisdiction of all consequential question ons, though properly determinable at common law (u). Wherefore, among other reasons, a fuit for beaconage of a beacon standing on a rock in the sea may be brought in the court of admiralty, the admiral having an original jurisdiction over beacons (w). In case of prizes also in time of war, be tween our own nation and another, or between two other nations, which are taken at fea, and brought into our ports, the courts of admiralty have an undiffurbed and exclusive jurisdiction to determine the same according to the law of nation ons (x).

THE proceedings of the courts of admiralty bear much refemblance to those of the civil law, but are not entirely founded thereon: and they likewise adopt and make use of other laws, as occasion requires; such as the Rhodian law, and the laws of Oleron (y). For the law of England, as has frequently been observed, doth not acknowledge or pay any deference to the civil law confidered as fuch; but merely permits its use in such cases where it judges its determinations equitable, and therefore blends it, in the present instance, with other marine laws: the whole being corrected, altered, and amended by acts of parliament and common usage; a that out of this composition a body of jurisprudence is extracted, which owes its authority only to its reception her, by confent of the crown and people. The first process in these courts is frequently by arrest of the defendant's person (z); and they also take recognizances or stipulation of certain fidejuffors in the nature of bail (a), and in case of default may imprifon

⁽v) Comb. 462. (u) 13 Rep. 53. 2 Lev. 25. Hard. 28; (w) 1 Sid. 158. (x) 2 Show. 232. Comb. 474. (y) Half. C. L. 36. Co. Litt. 11. (2) Clerke prax. cur. adm. §. 13. (a) Ibid. §. 11. 1 Roll. Abr. 531. Raym. 78. Lord Raym. 1286.

on

15

ot

01

the

fti-

u). f a

the

ion be-

her

rts, five

ati-

nuch

irely Se of

law,

has

any

per-

tions ance

ered,

e; fo

s ex-

here,

ess in

erfon

rtain

may rifon

283.

Hale,

admi Lord mprison both them and their principal (b). They may also ne and imprison for a contempt in the face of the court (c). and all this is supported by immemorial usage, grounded on ne necessity of supporting a jurisdiction so extensive (d); nough opposite to the usual doctrines of the common law: ness being no courts of record, because in general their prosess is much conformed to that of the civil law (e).

IV. I am next to confider fuch injuries as are cognizable the courts of the common law. And herein I shall for the efent only remark, that all possible injuries whatsoever, at do not fall within the cognizance of either the ecclefiaftil, military, or maritime tribunals, are for that very rean within the cognizance of the common law courts of juce. For it is a fettled and invariable principle in the laws England, that every right when with-held must have a medy, and every injury its proper redrefs. The definitiand explication of these numerous injuries, and their reective legal remedies, will employ our attention for many. blequent chapters. But, before we conclude the present, shall just mention two species of injuries, which will prorly fall now within our immediate confideration: and nich are, either when justice is delayed by an inferior urt that has proper cognizance of the cause; or, when ch inferior court takes upon itself to examine a cause and cide the merits without a legal authority.

1. The first of these injuries, refusal or neglect of justice, is nedied either by writ of procedendo, or of mandamus. A writ procedendo ad judicium issues out of the court of chancery, here judges of any court do delay the parties; for that they ll not give judgment, either on the one side or on the other, henthey ought so to do. In this case a writ of procedendo shall awarded, commanding them in the king's name to proceed to agment; but without specifying any particular judgment, for that

b) 1 Roll. Abr. 531. Godb. 193. 260. (c) 1 Ventr. 4. 1 Keb. 552. (e) Bro. Abr. 1. error. 177.

h

m

nt

rta

ho

afc

an

rn

d

her

enc

at,

fho

th

at t

at t

rhi

cove

th :

hus

2.

ildi

urt 1

ce,

wr

that (if erroneous) may be set aside in the course of appeal, or by writ of error or false judgment: and, upon farther neglet or refusal, the judges of the inferior court may be punished for their contempt, by writ of attachment returnable in the king's bench or common pleas (f).

A WRIT of mandamus is, in general, a command ishing in the king's name from the court of king's bench, and rected to any person, corporation, or inferior court of indicature, within the king's dominions : requiring them to de fome particular thing therein specified, which appertains to their office and duty, and which the court of king's bend has previously determined, or at least supposes, to be confo nant to right and justice. It is a high prerogative writ, of most extensively remedial nature: and may be iffued in som cases where the injured party has also another more tedion method of redress, as in the case of admission or restitution an office; but it issues in all cases where the party hath right to have any thing done, and hath no other specifi means of compelling its performance. A mandamus therein lies to compel the admission or redocation of the party apply ing, to any office or franchise of a public nature, whetherin ritual or temporal; to academical degrees; to the use of meeting-house; &c. it lies for the production, inspection or delivery, of public books and papers; for the furrenders the regalia of a corporation; to oblige bodies corporate affix their common feal; to compel the holding of a cour and for an infinite number of other purposes, which it is in possible to recite minutely. But at present we are more pr ticularly to remark, that it issues to the judges of any infer court, commanding them to do justice according to the por ers of their office, whenever the same is delayed. Forth the peculiar business of the court of king's bench to super tend all other inferior tribunals, and therein to inforce due exercise of those judicial or ministerial powers, with the crown or legislature have invested them: and this, note by restraining their excesses, but also by quickening their ne

nch

nso:

of:

ome

on to

th

ecific

efon

ply

rþi

of

tion er o

te t

e in

ferio

riti

et

ence, and obviating their denial of justice. A mandamus ay therefore be had to the courts of the city of London, to ter up judgment (g); to the spiritual courts to grant an adinistration, to swear a church-warden, and the like. This nt is grounded on a fuggestion, by the oath of the party inred, of his own right, and the denial of justice below: hereupon, in order more fully to fatisfy the court that there a probable ground for such interposition, a rule is made xcept in some general cases, where the probable ground is anifest) directing the party complained of to shew cause hy a writ of mandamus should not issue: and, if he shews o sufficient cause, the writ itself is issued, at first in the almative, either to do thus, or fignify forme reason to the ntrary; to which a return, or answer, must be made at a rtain day. And, if the inferior judge, or other person to nom the writ is directed, returns or fignifies an infufficient ason, then there issues in the second place a peremptory andamus, to do the thing absolutely; to which no other rem will be admitted, but a certificate of perfect obedience d due execution of the writ. If the inferior judge or her person makes no return, or fails in his respect and obeence, he is punishable for his contempt by attachment. at, if he, at the first, returns a sufficient cause, although: should be false in fact, the court of king's bench will not the truth of the fact upon affidavits; but will for the pre-1 it believe him, and proceed no farther on the mandamus. at then the party injured may have an action against him this false return, and (if found to be false by the jury) shall over damages equivalent to the injury sustained; together th a peremptory mandamus to the defendant to do his duty. hus much for the injury of neglect or refusal of justice.

2. The other injury, which is that of encroachment of iddiction, or calling one coram non judice, to answer in a urt that has no legal cognizance of the cause, is also a grieve, for which the common law has provided a remedy by writ of prohibition.

A PRO-

11

So

let

gg

rts

th

itio

H-t

cle

ac.

fi

ftm

rea

tion

y a

rt,

cau

ju

he k

he c

y if

y no

be

ion:

tion

he c

ction

ppofi w, i

ion,

ind o

A PROHIBITION is a writ issuing properly only out of the court of king's bench, being the king's prerogative writ; but for the furtherance of justice, it may now also be had in some cases out of the court of chancery (h), common pleas (i), w exchequer (k): directed to the judge and parties of a fuitin any inferior court, commanding them to cease from the profecution thereof, upon a fuggestion that either the cause on ginally, or fome collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. This writ may iffue either to inferior courts of common law; as, to the courts of the counties palatine or principality of Wales, if they hold plea of land or other matters notlying within their respective franchises (1); to the county-courts or courts-baron, where they attempt to hold plea of any matter of the value of forty shillings (m): ori may be directed to the courts christian, the university courts, the court of chivalry, or the court of admiralty, where they concern themselves with any matter not within their jurisdiction; as if the first should attempt to try the validity of a custom pleaded, or the latter a contract made or to be executed within this kingdom. Or if, in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England; as where they require two witnesses to prove the payment of a legacy, a release of tythes (n), or the like; in such cases also a prohibition will be awarded. For, as the fact of figning a releafe, or of actual payment, is not properly a spiritual question, but only allowed to be decided in those courts, because incident or accessory to some original question clearly within their jurisdiction; it ought therefore, where the two laws differ, to be decided not according to the spiritual, but the temporal law; else the same question might be determined different ways, according to the court in which the fuit is depending: a impropriety, which no wife government can or ought to endur,

⁽h) 1 P. Wms. 476. (l) Lord Raym. 1408. Eliz. 666. Hob. 188.

⁽i) Hob. 15. (k) Palmer 543-(m) Finch. L. 451. (n) Cro.

. 7.

is, ey

c-

ers

ey

a bi-

se,

CI-

eir

fer,

oral

ent

ire,

and

523.

Cro.

which is therefore a ground of prohibition. And, if einthe judge or the party shall proceed after such prohibition, attachment may be had against them, to punish them for contempt, at the discretion of the court that awarded it; and an action will lie aganst them, to repair the party ured in damages.

so long as the idea continued among the clergy, that the lefiaftical state was wholly independent of the civil, great ggles were constantly maintained between the temporal rts and the spiritual, concerning the writ of prohibition the proper objects of it; even from the time of the contions of Clarendon, made in opposition to the claims of k-bishop Becket in 10 Hen. II. to the exhibition of certain des of complaint to the king by arch-bishop Bancroft, in ac. I. on behalf of the ecclefiastical courts: from which, from the answers to them, figned by all the judges of stminster-hall (p), much may be collected concerning reasons of granting and methods of proceeding upon protions. A short summary of the latter is as follows. The y aggrieved in the court below applies to the fuperior t, fetting forth, in a fuggestion upon record, the nature cause of his complaint, in being drawn ad aliud examen, jurisdiction or manner of process disallowed by the laws te kingdom: upon which, if the matter alleged appears he court to be fufficient, the writ of prohibition immediy iffues; commanding the judge not, to hold, and the y not to prosecute, the plea. But sometimes the point be too nice and doubtful to be decided merely upon a ion: and then, for the more folemn determination of the tion, the party applying for the prohibition, is directed he court to declare in prohibition: that is, to profecute ction, by filing a declaration, against the other, upon pposition, or siction, that he has proceeded in the suit w, notwithstanding the writ of prohibition. And if, demurrer and argument, the court shall finally be of ion, that the matter suggested is a good and sufficient and of prohibition in point of law, then judgment with

⁽o) F. N. B. 40.

⁽p) 2 Inft 601.-618.

HI

ha

dre

es,

e a

the

ns'

e pi

iva

rely n I

cou.

ble

th

ver

RS

mn cul:

ne inte

nominal damages shall be given for the party complaining and the defendant, and also the inferior court, shall be me hibited from proceeding any farther. On the other hand, the fuperior court shall think it no competent ground form straining the inferior jurisdiction, then judgment shall he given against him who applied for the prohibition in the court above, and a writ of consultation shall be awarded; called, because, upon deliberation and consultation had, the judges find the prohibition to be ill founded, and therefor by this writ they return the cause to its original jurisdiction to be there determined, in the inferior court. And, even ordinary cases, the writ of prohibition is not absolutely find and conclusive. For, though the ground be a proper one point of law, for granting the prohibition, yet, if the fall the gave rife to it be afterwards falfified, the cause shall ben manded to the prior jurisdiction. If, for instance, a custo be pleaded in the spiritual court; a prohibition ought tog because that court has no authority to try it: but, if the fa of fuch a custom be brought to a competent trial, and there found false, a writ of consultation will be granted. It this purpose the party prohibited may appear to the prohib tion, and take a declaration, (which must always pursue fuggestion) and so plead to issue upon it; denying the on tempt, and traverling the custom upon which the prohibition was grounded: and, if that iffue be found for the defendant he shall then have a writ of consultation. The writ of consultation. tation may also be, and is frequently, granted by the cou without any action brought; when, after a prohibition issue upon more mature consideration the court are of opinion, the the matter fuggested is not a good and sufficient ground stop the proceedings below. Thus careful has the law bet in compelling the inferior courts to do ample and speedy tice; in preventing them from transgressing their due bound and in allowing them the undisturbed cognizance of in causes as by right, founded on the usage of the kingdom act of parliament, do properly belong to their jurisdiction

CHAPTE

CHAPTER THE EIGHTH.

ni

dl

COL

di

ea

nd

m

TE

WRONGS, AND THEIR REMEDIES, RESPECTING THE RIGHTS OF PERSONS.

HE former chapters of this part of our Commentaries having been employed in describing the several methods dreffing private wrongs, either by the mere act of the s, or the mere operation of law; and in treating of the e and several species of courts; together with the cogniof wrongs or injuries by private or special tribunals, the public ecclefiaftical, military, and maritime jurifns of this kingdom: I come now to confider at large, n a more particular manner, the respective remedies public and general courts of common law, for injuries ivate wrongs of any denomination whatfoever, not exely appropriated to any of the former tribunals. And al shall, first, define the several injuries cognizable by courts of common law, with the respective remedies apble to each particular injury: and shall, secondly, dethemethod of pursuing and obtaining these remedies in veral courts.

RST then, as to the several injuries cognizable by the courts mmon law, with the respective remedies applicable to each cular injury. And, in treating of these, I shall at present me myself to such wrongs as may be committed in the muntercourse between subject and subject; which the king, to fountain of justice, is officially bound to redress in the ordinary

if

t

an

le

qui

it.

om

a

er

a

nn

e n

the

ent

o t

RS for

by

lon

nd

re i

eto r n

all

, a

AL

ac

by 1

ny

Pro

erti

H. 4

dinary forms of law: referving such injuries or encountered as may occur between the crown and the subject, we distinctly considered hereafter; as the remedy in such case generally of a peculiar and eccentrical nature.

Now, as all wrong may be confidered as merely a prin on of right, the one natural remedy for every species wrong is the being put in possession of that right, when the party injured is deprived. This may either be effect by a specific delivery or restoration of the subject-matter dispute to the legal owner; as when lands or personal chart are unjustly withheld or invaded: or, where that is no possible, or at least not an adequate remedy, by making fufferer a pecuniary satisfaction in damages; as in case of fault, breach of contract, &c. to which damages thepa injured has acquired an incomplete or inchoate right, the flant he receives the injury (a): though fuch right be not ly ascertained till they are assessed by the intervention of law. The instruments whereby this remedy is obtain (which are fometimes confidered in the light of the remedy felf) area diversity of suits and actions, which are defined the mirrour (b) to be "the lawful demand of one's right:" as Bracton and Fleta express it, in the words of Justinian jus prosequendi in judicio quod alicui debetur.

THE Romans introduced, pretty early, set forms for all ones and suits in their law, after the example of the Greek and made it a rule, that each injury should be redressed its proper remedy only. "Actiones, say the pandects, or positae sunt, quibus inter se homines disceptarent, quarast ones ne populus prout wellet institueret, certas solennesquis wolverunt (d)." The forms of these actions were originally preserved in the books of the pontifical cosses, as characteristical cosses, the second inestimable secrets, till one Cneius Flavius, the second ry of Appius Claudius, stole a copy and published them the people (e). The concealment was ridiculous: but establishme

⁽a) See book II. ch. 29. (b) c. 2. §. 1. (c) Inf. 6. pr. (d) Ff. 1. 2. 2. §. 6. (e) Cic. pro Murains. 11. de orat. 1. 1. c. 41.

iskment of some standard was undoubtedly necesto fix the true state of a question of right; lest in a and arbitrary process it might be shifted continually, and length no longer difcernible. Or, as Cicero expresses , " funt jura, funt formulae, de omnibus rebus constitutae, quis aut in genere injuriae, aut in ratione actionis, errare it. Expressae enim sunt ex uniuscujusque damno, dolore. mmodo, calamitate, injuria, publicae a praetore formuad quas privata lis accommodatur." And in the fame er our Bracton, speaking of the original writs upon all our actions are founded, declares them to be fixed mutable, unless by authority of parliament (g). And e modern legislators of Europe have found it expedient, the same reasons, to fall into the same or a similar me-With us in England the feveral fuits, or remedial inents of justice, are from the subject of them distinguisho three kinds; actions personal, real, and mixed.

nei

of t

tain edy

ned t:"

an (

r ad

reek

ffed l

as ab

igina

choi

ecret

hem

outt

hine

Inft.

ena.

RSONAL actions are such whereby a man claims a debt, sonal duty, or damages in lieu thereof; and, likewise, by a man claims a satisfaction in damages for some intended on contracts, the latter upon torts or wrongs: and the same which the civil law calls "actiones in perm, quae adversus eum intenduntur, qui ex contractu vel so obligatus est aliquid dare vel concedere (h)." Of the mature are all actions upon debt or promises; of the all actions for trespasses, nusances, assaults, defamatory, and the like.

actions, (or as they are called in the mirror (i),
actions) which concern real property only, are fuch
by the plaintiff, here called the demandant, claims title to
my lands or tenements, rents, commons, or other hereditaments,

Pro Qu. Roscio. §. 8. (g) Suns quaedam brevia formata ertis casibus de cur su, et de communi consilio totius regni apaet concessa, quae quidem nullatenus mutari poterint absque et voluntate eorum. (l. 5 de exceptionibus, c. 17. §. 2.) s. 4.6.15. (i) c. 2. §. 6.

1

it.

777

a

nn

er

h

0 1

RS

for

by

on

nd re i

m,

all

a

L

act

by t

ny l

Pro

ris

et 4

dinary forms of law: referving fuch injuries or encountered as may occur between the crown and the fubject, a distinctly considered hereafter; as the remedy in such case generally of a peculiar and eccentrical nature.

Now, as all wrong may be confidered as merely a prin on of right, the one natural remedy for every species wrong is the being put in possession of that right, when the party injured is deprived. This may either be effet by a specific delivery or restoration of the subject-matter dispute to the legal owner; as when lands or personal char are unjustly withheld or invaded: or, where that is m possible, or at least not an adequate remedy, by making fufferer a pecuniary fatisfaction in damages; as in cale of fault, breach of contract, &c. to which damages them injured has acquired an incomplete or inchoate right, the ftant he receives the injury (a): though fuch right be not ly ascertained till they are assessed by the intervention of law. The instruments whereby this remedy is obtain (which are fometimes confidered in the light of the remedy felf) area diversity of suits and actions, which are defined the mirrour (b) to be "the lawful demand of one's right:" as Bracton and Fleta express it, in the words of Justinian jus proseguendi in judicio quod alicui debetur.

THE Romans introduced, pretty early, set forms for a ons and suits in their law, after the example of the Gree and made it a rule, that each injury should be redressed its proper remedy only. "Actiones, say the pandeds, o" positae sunt, quibus inter se homines disceptarent, quant ones ne populus prout wellet institueret, certas solennesques wolverunt (d)." The forms of these actions were originally preserved in the books of the pontifical college, as chand inestimable secrets, till one Cneius Plavius, the secrety of Appius Claudius, stole a copy and published them the people (e). The concealment was ridiculous: but established

⁽a) See book II. ch. 29. (b) c. 2. §. 1. (c) like 6. pr. (d) Ff. 1. 2. 2. §. 6. (e) Cic. pro Muraent. 11. de orat. l. 1. c. 41.

iskment of some standard was undoubtedly necesto fix the true state of a question of right; lest in a and arbitrary process it might be shifted continually, and length no longer difcernible. Or, as Cicero expresses , " funt jura, funt formulae, de omnibus rebus constitutae, quis aut in genere injuriae, aut in ratione actionis, errare it. Expressae enim sunt ex uniuscujusque damno, dolore, mmodo, calamitate, injuria, publicae a praetore formuad quas privata lis accommodatur." And in the same er our Bracton, speaking of the original writs upon all our actions are founded, declares them to be fixed mutable, unless by authority of parliament (g). And emodern legislators of Europe have found it expedient, the same reasons, to fall into the same or a similar me-With us in England the Teveral fuits, or remedial inents of justice, are from the subject of them distinguisho three kinds; actions personal, real, and mixed.

ng i

of

pa

hei

ot fi

otain

ned

t:"

ian (

or at

Greek effed

ts, co

sque !

rigu

s cho

them

but

ishme

) Infla

aens.

fonal duty, or damages in lieu thereof; and, likewife, by a man claims a fatisfaction in damages for some inone to his person or property. The former are said to nded on contracts, the latter upon torts or wrongs: and re the same which the civil law calls "actiones in perm, quae adversus eum intenduntur, qui ex contractu vel to obligatus est aliquid dare vel concedere (h)." Of the nature are all actions upon debt or promises; of the all actions for trespasses, nusances, assaults, defamatory, and the like.

Lactions, (or as they are called in the mirror (i), actions) which concern real property only, are fuch by the plaintiff, here called the demandant, claims title to my lands or tenements, rents, commons, or other hereditaments,

Pro Qu. Roscio. §. 8. (g) Sunt quaedam brevia formata riis casibus de cur su, et de communi consilio totius regni apet concessa, quae quidem nullatenus mutari poterint absque et voluntate ecrum. (l. 5 de exceptionibus, c. 17. §. 2.) 4.6, 15. (i) c. 2. §. 6.

nd de

0 6

ri

on

riv

n n

A

als

s,

M

he

lat

fub

) F

ments, in fee-simple, fee-tail, or for term of life. Is actions formerly all disputes concerning real estates were ed; but they are now pretty generally laid aside in mupon account of the great nicety required in their ment, and the inconvenient length of their process: a more expeditious method of trying titles being since duced, by other actions personal and mixed.

MIXED actions are suits partaking of the nature other two, wherein some real property is demanded, a personal damages for a wrong sustained. As for in an action of waste: which is brought by him who inheritance, in remainder or reversion, against the tens life, who hath committed waste therein, to recover not the land wasted, which would make it merely a real but also treble damages, in pursuance of the statuted cester (k), which is a personal recompence; and so being joined together, denominate it a mixed action.

UNDER these three heads may every species of rem fuit or action in the courts of common law be con But in order effectually to apply the remedy, it is ceffary to ascertain the complaint. I proceed therefor to enumerate the feveral kinds, and to enquire into spective natures, of all private wrongs, or civil which may be offered to the rights of either a man's pa his property; recounting at the same time the respect medies, which are furnished by the law for every of right. But I must first beg leave to premise, that injuries are of two kinds, the one without force or as flander or breach of contract; the other coupled and violence, as batteries, or false imprisonment (1) latter species savour something of the criminal kind always attended with fome violation of the pex which in strictness of law a fine ought to be paid to

1/2

e of

lo

١,

emt

:om

is f

retor

nto

il in

y inf

hat a

or W

d and (1).

kind, peac

to the

184

well as private satisfaction to the party injured (m). And distinction of private wrongs, into injuries with and withforce, we shall find to run through all the variety of chew are now to treat. In considering of which, I shall ow the same method that was pursued with regard to the sibution of rights: for as these are nothing else but an ingement or breach of those rights, which we have before down and explained, it will follow that this negative em, of wrongs, must correspond and tally with the forpositive system, of rights. As therefore we divided (n) rights into those of persons, and those of things, so we make the same general distribution of injuries into such affect the rights of persons, and such as affect the rights roperty.

THE rights of persons, we may remember, were distried into absolute and relative: absolute, which were such as ertained and belonged to private men, considered merely adividuals, or single persons; and relative, which were dent to them as members of society, and connecto each other by various ties and relations. And the absorights of each individual were defined to be the right of lonal security, the right of personal liberty and the right rivate property: so that the wrongs or injuries affecting a must consequently be of a correspondent nature.

As to injuries which affect the personal security of indials, they are either injuries against their lives, their s, their bodies, their health, or their reputations.

WITH regard to the first subdivision, or injuries affectthe life of man, they do not fall under our present conplation; being one of the most atrocious species of crimes, subject of the next book of our Commentaries.

2, 3. THE

⁾ Finch. L. 198. Jenk. Cent. 185. (n) See book I. ch. 1.

d

c

nd d

li

la

sp

ich mis

nun rt,

ybe

s in

s ag

for

eex

fe d

). I

no n

htin

oto

ful)

the

n. V

nd he

ttery

well

uted

VOL

1 (1)

2, 3. THE two next species of injuries, affecting the lin or bodies of individuals, I shall consider in one and the view. And these may be committed, 1. By threats menaces of bodily hurt, through fear of which a man's b ness is interrupted. A menace alone, without a consequence inconvenience, makes not the injury; but to complete wrong, there must be both of them together (o). The medy for this is in pecuniary damages, to be recovered action of trespass vi et armis (p), this being an inche though not an absolute, violence. 2. By assault; which is attempt or offer to beat another, without touching him: one lifts up his cane, or his fift, in a threatening manner another; or strikes at him, but misses him; this is an alla insultus, which Finch (q) describes to be " an unlawfulset " upon one's person." This also is an inchoate violen amounting confiderably higher than bare threats; and the fore, though no actual fuffering is proved, yet the party jured may have redress by action of trespass vi et am wherein he shall recover damages as a compensation for injury. 3. By battery; which is the unlawful beating of ther. The least touching of another's person wilfully, a anger, is a battery; for the law cannot draw the line betw different degrees of violence, and therefore totally prohi the first and lowest stage of it: every man's person be facred, and no other having a right to meddle with it, in the flightest manner. And therefore upon a similar pri ple the Cornelian law de injuriis prohibited pullation well as verberation; diffinguishing verberation, which accompanied with pain, from pulfation which was atten with none (r). But battery is, in some cases, justing or lawful; as where one who hath authority, a pa or master, gives moderate correction to his child, his lar, or his apprentice. So also on the principle of selffence: for if one strikes me first, or even only affaults ! may strike in my own defence; and, if sued for it, plead fon affault demesne, or that it was the plaintiff's own

⁽o) Finch. L. 202. (p) Registr. 104. 27 Ast. 11. 7 Edw. VI. (q) Finch. L. 202. (r) Ff. 47. 10. 5.

ty

177

or

fa

, or

etw

be

pri

ion

chi

ten

tifia

elf

t, 1

WI

ere any original affault that occasioned it. So likewise in fence of my goods or possession, if a man endeavours to prive me of them, I may justify laying hands upon him to vent him: and in case he persists with violence, I may prod to beat him away (r). Thus too in the exercise of an ice, as that of church-warden or beadle, a man may lay nds upon another to turn him out of church, and prevent disturbing the congregation (s). And, if sued for this or like battery, he may fet forth the whole case, and plead that laid hands upon him gently, molliter manus imposuit, for spurpose. On account of these causes of justification, baty is defined to be the unlawful beating of another; for ich the remedy is, as for affault, by action of trespass vi et mis: wherein the jury will give adequate damages. 4. By unding; which confifts in giving another some dangerous rt, and is only an aggravated species of battery. 5. By yhem; which is an injury still more atrocious, and consin violently depriving another of the use of a member profor his defence in fight. This is a battery, attended with s aggravating circumstance, that thereby the party injured for ever disabled from making so good a defence against fueexternal injuries, as he otherwise might have done. Among le defensive members are reckoned not only arms and legs, ta finger, an eye, and a fore-tooth (t), and also some others . But the loss of one of the jaw-teeth, the ear, or the nose, 10 mayhem at common law; as they can be of no use in hing. The fame remedial action of trespass vi et armis lies oto recover damages for this injury; an injury, which (when ful) no motive can justify, but necessary self-preservation. the ear be cut off, treble damages are given by statute 37 n. VIII. c. 6. though this is not mayhem at common law. dhere I must observe, that for these four last injuries, assault, tery, wounding, and mayhem, an indictment may be brought well as an action; and frequently both are accordingly prouted; the one at the fuit of the crown for the crime against VOL. III.

Beginneralism, Cyl. (Ronder, Best, 191

^{(1) 1} Finch. L. 203. (6) 1 Sid. 301. (1) Finch, L. 204. (1) 1 Hawk. P. C. 111.

re

ar

e

ca

e c

on

a

nj

W

r p

Is .

bab

is,

of

l ca

LAS

ar

, te

ioul

wh

for

r,

locie

01. 4

call : ver a

a ju

led (h); the

of fu

See p 78.

inch.

the public; the other upon the fuit of the party injured make him a reparation in damages. m less

4. INJURIES, affecting a man's bealth, are, where by unwholesome practices of another, a man sustains any rent damage in his vigour or constitution. As by selling bad provisions or wine (w); by the exercise of a noise trade, which infects the air in his neighbourhood (x); or the neglect or unskilful management of his physician, surge or apothecary. For it hath been folemnly refolved (v); mala praxis is a great misdemesnor and offence at commonly whether it be for curiofity and experiment, or by negle because it breaks the trust which the party had placed in physician, and tends to the patient's destruction. Thus a in the civil law (z), neglect or want of skill in physicians furgeons " culpae adnumerantur; veluti si medicus curaim " dereliquerit, male quempiam secuerit, aut perperam ein " camentum dederit." These are wrongs or injuries unaco panied by force, for which there is a remedy in damage a special action of trespass, upon the case. This action trespals, or transgression, on the case, is an universal remo given for all personal wrongs and injuries without force; called, because the plaintiff's whole case or cause of complaintiff's whole case or cause of complaintiff's is fet forth at length in the original writ (a). For though general there are methods prescribed and forms of actions viously settled, for redressing those wrongs which must will occur, and in which the very act itself is immediately prem eial or injurious to the plaintiff's person or property, as batto non-payment of debts, detaining one's goods, or the like;

⁽w) i Roll. Abr. 90. (x) 9 Rep. 57. Hutt. 135. Lord Raym. 214. (2) Inst. 4. 3. 6. & 7. (2) For exam.

"Rex vicecomiti salutem. Si A fecerit te securum de clamm.

prosequende, tunc pone per vadium et salvos plegios B, qui eoram justitiariis nostris apud Westmonnsterium in oclabit Michaelis, oftensurus quare cum idem B ad dextrum oculun 46 A cajualiter laesum bene et competenter curandum apud

⁴⁰ quadam pecuniae summa prae manibus soluta assumpfist.

⁴⁶ B curam suam circa oculum praedictum tam negligenter et is 48 vide apposuit, quod idem A defectu ippus B visum oculi prat totaliter amisit, ad damnum ipsius A viginti librarum, ut dish babeas ibi nomina plegiorum et boc breve. Teste meissi

[&]quot; Westmonasterium, &c." (Registr. Brev. 105.)

e any special consequential damage arises which could not reseen and provided for in the ordinary course of justice. arty injured is allowed, both by common law and the e of Westm. 2. c. 24. to bring a special action on his case, by a writ formed according to the peculiar circumof his own particular grievance (b). For wherever ommon law gives a right or prohibits an injury, it also a remedy by action (c); and therefore, wherever a injury is done, a new method of remedy must be purfued And it is a settled distinction (e), that where an act is which is in itself an immediate injury to another's perproperty, there the remedy is usually by an action of is vi et armis: but where there is no act done, but only able omission; or where the act is not immediately ins, but only by consequence and collaterally; there no of trespass vi et armis will lie, but an action on the case, for the damages consequent on such omission or

LASTLY; injuries affecting a man's reputation or good are, first, by malicious, scandalous, and slanderous , tending to his damage and derogation. As if a man, oully and falfely, utter any flander or falfe tale of anowhich may either endanger him in law, by impeaching some heinous crime, as to say that a man hath poisoned , or is perjured (f); or which may exclude him ociety, as to charge him with having an infectious difor which may impair or hurt his trade or livelyhood, all a tradesman a bankrupt, a physician a quack, or er a knave (g). Words spoken in derogation of a a judge, or other great officer of the realm, which led scandalum magnatum, are held to be still more hei-(h); and, though they be fuch as would not be actionathe case of a common person, yet when spoken in disof fuchhigh and respectable characters, they amount to F 2 an

bee pag. 51. (c) 1 Salk. 20. 6 Mod. 54. (d) Cro. 78. (e) 11 Mod. 180. Lord Raym. 1402. Stra. 635. inch, L, 185. (g) Ibid. 186. (h) 1 Ventr. 60.

ra of

le

of

rc

ma

(p)

ing

to (r) vor

dan

fI

k, 1

oy t

e fu

um

no

law

num

opo

SEC

ritte

n ar

is re

mai

er b

libe

ak it

Noy. ro. Ja Rep.

99.

an atrocious injury: which is redreffed by an action on case founded on many antient statutes (i); as well on be of the crown, to inflict the punishment of imprisonment the flanderer, as on behalf of the party, to recover damage the injury fustained. Words also tending to scandalize a gistrate, or person in a public trust, are reputed more his injurious than when spoken of a private man (k). It is that formerly no actions were brought for words, unless flander was fuch, as (if true) would endanger the life of object of it (1). But, too great encouragement being by this lenity to false and malicious slanderers, it is nowh that for scandalous words of the several species before-me oned, that may endanger a man in law, may exclude from society, may impair his trade, or may affect a per the realm, a magistrate, or one in public trust, an action the case may be had, without proving any particular dam to have happened, but merely upon the probability the might happen. But with regard to words that do not apparently, and upon the face of them, import such defa tion as will of course be injurious, it is necessary that plaintiff should aver some particular damage to have happen which is called laying his action with a per quod. A I fay that fuch a clergyman is a baftard, he cannot for bring any action against me, unless he can shew some for loss by it; in which case he may bring his action ag me, for faying he was a baftard, per quod he loft the fentation to fuch a living (m). In like manner, to flat another man's title, by spreading such injurious reports if true, would deprive him of his estate (as to call the ish tail, or one who hath land by descent, a bastard) is ach ble provided any special damage accrues to the propr thereby; as if he loses an opportunity of selling the land But mere fcurrility, or opprobrious words, which neith themselves import, nor are in fact attended with, any injur effects, will not support an action. So scandals, which con

⁽i) Westm. 1. 3 Edw. I. c. 34. 2 Ric. II. c. 5. 12 Ric. 11. (k) Lord Raym. 1369. (l) 2 Vent. 28. (m)4
17. 1 Lev. 248. (n) Cro. Jac. 213. Cro. Eliz. 197.

ers merely spiritual, as to call a man heretic or adulterer, ognizable only in the ecclefiaftical court (o); unless any oral damage enfues, which may be a foundation for a mod. Words of heat and paffion, as to call a man rogue rascal, if productive of no ill consequence, and not of of the dangerous species before-mentioned, are not actile: neither are words spoken in a friendly manner, as by of advice, admonition, or concern, without any tincture roumstance of ill will: for, in both these cases, they are maliciously spoken, which is part of the definition of slan-(p). Neither (as was formerly hinted) (q) are any reng words made use of in legal proceedings, and pertito the cause in hand, a sufficient cause of action for slan-(r). Also if the defendant be able to justify, and prove words to be true, no action will lie (s), even though fpetamage hath enfued : for then it is no flander or false tale. f I can prove the tradesiman a bankrupt, the physician a k, the lawyer a knave, and the divine a heretic, this will by their respective actions: for though there may be dafufficient accruing from it, yet, if the fact be true, it is um absque injuria; and where there is no injury, the law no remedy. And this is agreeable to the reasoning of the law (t): " eum, qui nocentem infamat, non est aequum et um ob eam rem condemnari; delicta enim nocentium nota oportet et expedit."

at

pen

for

fpe

he flan

orts

iffo

actio

opn

ind

eith

nju

COL

ma

Ric.

n) 4

second way of affecting a man's reputation is by printed ritten libels, pictures, figns, and the like; which fet n an odious or ridiculous (u) light, and thereby diminis reputation. With regard to libels in general, there are, many other cases, two remedies; one by indictment and ler by action. The former for the public offence; for libel has a tendency to break the peace, or provoke others akit: which offence is the same, whether the matter con-

F 3 tained

Noy. 64. 1 Freem. 277. (p) Finch. L. 186. 1 Lev. 10. Jac. 91. (q) Pag. 29. (r) Dyer. 285. Cro. Jac. 90. Rep. 13. (t) Ff. 47. 10. 18. (u) 2 Show. 314. 11.

I

rf

So

ent

bar

em

ón

ned

To

ints

he t

per

fon, ly d

fe, in

m fo

rrant hand

nt (d

liame

fon v

olic fe

iour i

y arife

6) 10

(e

tained be true or false; and therefore the defendant, on a dictment for publishing a libel, is not allowed to allege truth of it by way of justification (w). But in the ren by action on the case, which is to repair the party in dams for the injury done him, the defendant may, as for m Spoken, justify the truth of the facts, and shew that the pla tiff has received no injury at all (x). What was faid regard to words spoken, will also hold in every particular regard to libels by writing or printing, and the civil at confequent thereupon: but as to figns or pictures, it is necessary always to shew, by proper innuendo's and avern of the defendant's meaning, the import and application the fcandal, and that some special damage has follow otherwise it cannot appear, that such libel by picture was derstood to be levelled at the plaintiff, or that it was atten with any actionable confequences.

A THIRD way of destroying or injuring a man's reput is, by preferring malicious indictments or profecutions as him; which, under the mask of justice and public spirit fometimes made the engine of private spite and enmity. this, however, the law has given a very adequate ren in damages, either by an action of conspiracy (v), w cannot be brought but against two at the least; or, while the more usual way, by a special action on the case for a and malicious profecution (z). In order to carry on the mer (which gives a recompence for the danger to which party has been exposed) it is necessary that the plaintiff obtain a copy of the record of his indictment and acqui but, in profecutions for felony, it is usual to deny a of the indictment, where there is any, the least, pro cause to found such prosecution upon (a). For it be a very great discouragement to the public justice of kingdom, if profecutors, who had a tolerable ground of cion, were liable to be fued at law whenever their indican miscan

⁽w) 5 Rep. 125. (x) 11 Mod. 99. (y) Finch. L (z) F. N. B. 116. (a) Carth 421. Lord Raym. 253

id A

2

rob

e of

off

Elm

(car

3

founded on such an indictment whereon no acquittal can; as if it be rejected by the grand jury, or be coram non dice, or be insufficiently drawn. For it is not the danger the plaintiff, but the scandal, vexation, and expense, upon hich this action is sounded (b). However, any probable use for preferring it is sufficient to justify the defendant.

II. We are next to consider the violation of the right of fonal liberty. This is effected by the injury of false imfonment, for which the law has not only decreed a punishent, as a heinous public crime, but has also given a private paration to the party; as well by removing the actual contement for the present, as, after it is over, by subjecting the long doer to a civil action, on account of the damage suffered by the loss of time and liberty.

To constitute the injury of false imprisonment there are two ints requisite: 1. The detention of the person; and, 2... he unlawfulness of such detention. Every confinement of person is an imprisonment, whether it be in a common fon, or in a private house, or in the stocks, or even by forly detaining one in the public streets (c). Unlawful, or le, imprisonment consists in such confinement or detention hout sufficient authority: which authority may arise either m some process from the courts of justice; or from some mant from a legal officer having power to commit, under hand and feal, and expressing the cause of such commitnt (d); or from some other special cause warranted, for necessity of the thing, either by common law, or act of liament; fuch as the arresting of a felon by a private on without warrant, the impressing of mariners for the lic service, or the apprehending of waggoners for misbefour in the public highways (e). False imprisonment also yarise by executing a lawful warrant or process at an unlawful F 4

b) 10 Mod. 219. Stra. 691. (c) 2 Inft. 589. (d) Ibid. (e) Stat. 7 Geo. III. c. 42.

evi

th

arg

igi

wi

ma

gua

al re

con

s, t

tiqu: beh:

4. 7

the

de 1

pri

y ad

respo

who

order

k) 2]

n) Ni

itiarii

alique

lawful time, as on Sunday (f); or in a place privileged from arrests, as in the verge of the king's court. This is the injury. Let us next see the remedy: which is of two some the one removing the injury, the other making satisfaction for

THE means of removing the actual injury of false imprisonment, are fourfold. 1. By writ of mainprize. 2. By winde odio et atia. 3. By writ de homine replegiando. 4. By wo of habeas corpus.

- 1. The writ of mainprize, manucaptio, is a writ direct to the sheriff, (either generally, when any man is imprison for a bailable offence, and bail hath been refused; or specially when the offence or cause of commitment is not properly ball able below) commanding him to take sureties for the prison er's appearance, usually called mainpernors, and to set he at large (g). Mainpernors differ from bail, in that a man bail may imprison or surrender him up before the stipulate day of appearance; mainpernors can do neither, but a barely sureties for his appearance at the day: bail are on sureties, that the party be answerable for the special mate for which they stipulate; mainpernors are bound to produce him to answer all charges whatsoever (h).
- 2. THE writ de odio et atia was antiently used to be direct to the sheriff, commanding him to enquire whether a prilon charged with murder was committed upon just cause sufficient, or merely propter odium et atiam, for ham and ill-will; and, if upon the inquisition due cause of a picion did not appear, then there issued another write the sheriff to admit him to bail. This writ, according to Bracton (i), ought not to be denied to any main it being expressly ordered to be made out gratis, with any denial, by magna carta, c. 26. and statute Westmany denial, by magna carta, c. 26. and statute Westmany denial, by magna carta, c. 26.

(f) Stat 29. Car. II. c. 7. (g) F. N. B. 250. I Hat. P. 141. Coke on bail and mainpr. ch. 10. (h) Co. Ibid. d. 4 Inft. 179. (i) l. 3 tr. 2. c. 8.

rdi

itho

lm.

P. d

Edw. I. c. 29. But the statute of Glocester, 6 Edw. I. 9. restrained it in the case of killing by misadventure or states; and the statute 28 Edw. III. c. 9. abolished it all cases whatsoever; but as the statute 42 Edw. III. c. 1. pealed all statutes then in being, contrary to the great charter, Edward Coke is of opinion, (k) that the writ de otio et atia is thereby revived.

1. THE writ de homine replegiando (1) lies to replevy a man t of prison, or out of the custody of any private person, the same manner that chattels taken in distress may bereevied, of which in the next chapter) upon giving fecurity the sheriff, that the man shall be forthcoming, to answer any arge against him. And, if the person be conveyed out of heriff's jurisdiction, the sheriff may return that he is igned, elongatus; upon which a process iffues (called a capias ... withernam) to imprison the defendant himself, without bail mainprize (m), till he produces the party. But this writ guarded with so many exceptions (n), that it is not an effecalremedy in numerous instances, especially where the crown concerned. The incapacity therefore of these three remes, to give complete relief in every case, hath almost intirely tiquated them, and hath caused a general recourse to be had. behalf of persons aggrieved by illegal imprisonment, to

the English law. Of this there are various kinds are used of by the courts at Westminster, for remover prisoners from one court into another, for the more y administration of justice. Such is the habeas corpus respondendum, when a man hath a cause of action against who is confined by the process of some inferior court, order to remove the prisoner, and charge him with this

new

k) 2 Inst. 43.55.315. (1) F. N. B. 66. (m) Raym. 474.

a) Nisi captus est per speciale praceptam nostrum, vel capitalis litiarii nostri, vel pro morte hominis, vel pro foresta nostra, vel aliquo alio retto, quare secundum consuetudinem Anglia non replegiabilis. (Registr. 77.)

he

or

di

ro

is

ien

rc

rhi

w

me

affi

£th

ave

eftra

iff

imf

w);

orne

ourt

aitór

ave :

rifon

im (

ey c

(8) .

Bery

minis

ned t

3.54

new action in the court above (o). Such is that ad fatisfact endum, when a prisoner hath had judgment against him in a action, and the plaintiff is defirous to bring him up to for fuperior court, to charge him with process of execution (a) Such also are those ad prosequendum, testificandum, delibera dum, &c. which issue when it is necessary to remove a mifoner, in order to profecute or bear testimony in any court or to be tried in the proper jurisdiction wherein the fact was committed. Such is, lastly, the common writ ad faciendar et recipiendum, which issues out of any of the courts of Westminster-hall, when a person is sued in some inferior is risdiction, and is desirous to remove the action into the superindiction, rior court; commanding the inferior judges to produce to body of the defendant, together with the day and caused his caption and detainer, (whence the writ is frequently denom nated an babeas corpus cum causa) to do and receive whatsom the king's court shall consider in that behalf. This is a will erantable of common right, without any motion in court (4) and it instantly supersedes all proceedings in the court below But, in order to prevent the furreptitious discharge of prilos ers, it is ordered by flatute 1 & 2 P. & M. c. 13. that a babeas corpus shall issue to remove any prisoner out of an gaol, unless figned by some judge of the court out of which is awarded. And, to avoid vexatious delays by removal frivolous causes, it is enacted by statute 21 Jac. I. c. 23.tha where the judge of an inferior court of record is a barries of three years standing, no cause shall be removed from thence by habeas corpus or other writ, after iffue or demund deliberately joined: that no cause, if once remanded to the inferior court by writ of procedendo or otherwise, shall everal terwards be again removed: and that no cause shall be removed ed at all, if the debt or damages laid in the declaration don amount to the fum of five pounds. But an expedient (r) has ing been found out to elude the latter branch of the fatule by procuring a nominal plaintiff to bring another action to five pounds or upwards, (and then by the course of the course

⁽o) 2 Mod. 198. (p) 2 Lilly prac. reg. 4. (q) 2 Mos 306. (r) Bohun instit, legal. 85, edit. 1708.

he habeas corpus removed both actions together) it is therefore nacted by statute 12 Geo. I. c. 29. that the inferior court nay proceed in such actions as are under the value of sive ounds, notwithstanding other actions may be brought against he same desendant to a greater amount.

But the great and efficacious writ, in all manner of illegal onfinement, is that of babeas corpus ad subjiciendum; directd to the person detaining another, and commanding him to roduce the body of the prisoner, with the day and cause of is caption and detention, ad faciendum, subjiciendum, et reciiendum, to do, fubmit to, and receive, whatfoever the judge court awarding fuch writ shall consider in that behalf (s). This is a high prerogative writ, and therefore by the common wiffuing out of the court of king's bench, not only in termme, but also during the vacation (t), by a fiet from the chief office or any other of the judges, and running into all parts. fthe king's dominions: for the king is at all times intitled to ave an account, why the liberty of any of his subjects is estrained (u), wherever that restraint may be inflicted. If iffues in vacation, it is usually returnable before the judge imfelf who awarded it, and he proceeds by himfelf thereon w); unless the term should intervene, and then it may be reumed in court (x). Indeed, if the party were privileged in the ourts of common pleas and exchequer, as being an officer or nitor of the court, an habeas corpus ad subjiciendum might also ave been awarded from thence (y): and, if the cause of imrisonment were palpably illegal, they might have discharged im (z); but, if he were committed for any criminal matter, tey could only have remanded him, or taken bail for his regional matrices, and again from appear- ..

odr vel bahanebaha te

⁽s) St. Trials. viii. (t) The pluries babeas corpus directed Berwick in 43 Eliz. (cited 4 Burr. 856.) was teste'd die Jovis (x' post quinden' sancti Martini. It appears, by referring to the minical letter of that year, that this quindena (No. 25.) hapmed that year on a Saturday. The Thursday after was the refer the 30th of November, two days after the expiration of the m. (a) Cro. Jac. 543. (b) 4 Burr. 856. (c) 1bid. 63.542. 606. (y) 2 Inst. 55. 4 Inst. 290; 2 Hal. P. C. 44. 2 Ventr. 22. (z) Vaugh. 155.

n

is

e

C

In

be

or

oc.

t t

e fi

wn

eir

in c

ero

ittle

al d

the

gfi

ert a

inco

d in

prot

dists t, w

nt o

e nec

whi

y ex

ces

prife

Beol

appearance in the court of king's bench (a); which occasioned the common pleas to discountenance such applications. It hath also been said, and by very respectable authorities (b), that the like habeas corpus may issue out of the court of chancery in vacation: but, upon the famous application to lost Nottingham by Jenks, notwithstanding the most diligent searches, no precedent could be found where the chancellor had issued such a writ in vacation (c), and therefore his lost ship refused it.

In the court of king's bench it was, and is still, necessary to apply for it by motion to the court (d), as in the case of all other prerogative writs (certiorari, prohibition, mandamu, &c.) which do not iffue as of mere course, without shewing fome probable cause why the extraordinary power of the crown is called in to the party's affiftance. For, as was argued by lord chief justice Vaughan (e), "it is granted on motion, " because it cannot be had of course; and there is therefore " no necessity to grant it: for the court ought to be fatisfied that " the party hath a probable cause to be delivered." Andthis feems the more reasonable, because (when once granted) the person to whom it is directed can return no satisfactory excel for not bringing up the body of the prisoner (f). So that, if it issued of mere course, without shewing to the court or judge fome reasonable ground for awarding it, a traitor or felon under fentence of death, a foldier or mariner in the king's service a wife, a child, a relation, or a domestic, confined for infanity or other prudential reasons, might obtain a temporary colargement by fuing out an babeas corpus, though fure to bent manded as foon as brought up to the court. And therefore Edward Coke, when chief justice, did not scruple in 13 Jan I. to deny a habeas corpus to one confined by the court of al miralty for piracy: there appearing, upon his own flewing fufficient grounds to confine him (g). On the other hand, if probable

⁽a) Carter. 221. 2 Jon. 13. (b) 4 Inft. 182. 2 Hal. P. C. 147. (c) Lord Nott. MSS. Rep. July 1676. (d) 2 Mod. 306. 1. Lev. 1. (e) Bushell's case. 2 Jon. 13. (f) Con Jac. 543. (g) 3 Busher. 27. See also 2 Roll. Rep. 138.

obable ground be shewn, that the party is imprisoned withtjust cause (h), and therefore hath a right to be delivered, the rit of habeas corpus is then a writ of right, which "may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by the command of the king, the privy council, or any other (i)."

In a former part of these commentaries (k) we expatiated large on the personal liberty of the subject. It was shewn be a natural inherent right, which could not be furrenderor forfeited, unless by the commission of some great and ocious crime, nor ought to be abridged in any case withthe special permission of law. A doctrine co-eval with first rudiments of the English constitution; and handed wn to us from our Saxon ancestors, notwithstanding all ir ftruggles with the Danes, and the violence of the Norin conquest; afferted afterwards and confirmed by the Coneror himself and his descendants: and though sometimes ittle impaired by the ferocity of the times, and the occasial despotism of jealous or usurping princes, yet established the firmest basis by the provisions of magna carta, and a gluccession of statutes enacted under Edward III. To ert an absolute exemption from imprisonment in all cases, inconsistent with every idea of law and political society; in the end would destroy all civil liberty, by rendering protection impossible: but the glory of the English law fifts in clearly defining the times, the causes, and the ext, when, wherefore, and to what degree, the imprisonnt of the subject may be lawful. This induces an absoenecessity of expressing upon every commitment the reason which it is made, that the court upon an babeas corpus y examine into its validity; and according to the circumless of the case may discharge, admit to bail, or remand prisoner.

AND

ce,

en-

e fir

ac.

ad-

100

ifa

b) 2 Inft. 615. Book I. ch. 1.

⁽i) Cora. journ. Apr. 1628.

c

ie

rit

A I

ım,

ail

hic

nft

de

con

for

ifts

hoe

rve,

m

ther

w,

fe ir divid

r. I

car

fub efe v uing

w an

Pag

AND yet; early in the reign of Charles I. the court of king bench, relying on some arbitrary precedents. (and those perhaps mifunderstood) determined (1) that they could not upon an babeas corpus either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council. This drew on a parliamentary enquiry, and produced the petition of right, 3 Car. I. which recites this illegal judgment, and enacts, that no freeman hereafter hil be so imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords the council, in pursuance of his majesty's special command under a general charge of " notable contempts and firm " up fedition against the king and government," the judge delayed for two terms (including also the long vacation) deliver an opinion how far fuch a charge was bailable. And when at length they agreed that it was, they however a nexed a condition of finding fureties for the good behaviour which still protracted their imprisonment; the chief justice fir Nicholas Hyde, at the same time declaring (m), the " if they were again remanded for that cause, perhaps the " court would not afterwards grant a habeas corpus, being " ready made acquainted with the cause of the imprison " ment." But this was heard with indignation and altonia ment by every lawyer present; according to Mr. Selden own account of the matter, whose resentment was not cook at the distance of four and twenty years (n).

THESE pitiful evalions gave rife to the statute 16 Car. It to. §. 8. whereby it was enacted, that if any person be committed by the king himself in person, or by his privy cound

⁽¹⁾ State Tr. vii. 136, (m) Ibid. 240.

⁽n) " Etiam judicum tunc primarius, nisi illud faceremus, si scripti illius forensis, qui libertatis personalis omnimodae vinti

e legitimus est fere solus, usum omnimodum palam pronuncion

⁽sui semper similis) nobis perpetuo in posterum deneganda Quod, ut odiosissimum juris prodigium, scientiaribus hicunius

[&]quot; cenfitum." (Vindic. Mar. clauf. edit. A. D. 1053)

th

ole

om

nci

by any of the members thereof, he shall have granted unto im, without any delay upon any pretence what soever, a writ habeas corpus, upon demand or motion made to the court king's bench or common pleas; who shall thereupon, within ree court days after the return is made, examine and deterine the legality of such commitment, and do what to juice shall appertain, in delivering, bailing, or remanding ch prisoner. Yet still in the case of Jenks, before alluded (0), who in 1676 was committed by the king in council raturbulent speech at Guildhall (p), new shifts and devices ere made use of to prevent his enlargement by law; the hef justice (as well as the chancellor) declining to award a rit of habeas corpus ad subjiciendum in vacation, though at If he thought proper to award the usual writs ad deliberanm, &c. whereby the prisoner was discharged at the Old ailey. Other abuses had also crept into daily practice. hich had in some measure defeated the benefit of this great inflitutional remedy. The party imprisoning was at liberty delay his obedience to the first writ, and might wait till a cond and a third, called an alias and a pluries, were iffued. fore he produced the party: and many other vexatious ifts were practifed to detain state-prisoners in custody. But hoever will attentively confider the English history-may obwe, that the flagrant abuse of any power, by the crown or ministers, has always been productive of a struggle; which ther discovers the exercise of that power to be contrary to w, or (if legal) restrains it for the future. This was the se in the present instance. The oppression of an obscure dividual gave birth to the famous babeas corpus act; 31 r. II. c. 2. which is frequently confidered as another magcarta (q) of the kingdom; and by consequence has also subsequent times reduced the method of proceeding on the writs (though not within the reach of that statute, but ling merely at the common law) to the true standard of w and liberty.

THE

Pag. 132. (p) State Trials. vi. 471. (q) See book I. ch. 1:

as

th

ifor

ell d

nch

nyi

ne

50

e c

aces habi

ayin

ence

nerte

in t

istan

ol. t

y off

mire

THI

ich e

ents

ce to

her: beas

mmo:

at the

any

which

y, th

beca

ture,

THE statute itself enasts, 1. That the writ shall be returned and the prisoner brought up, within a limited time, atcording to the distance, not exceeding in any case twenty days. 2. That fuch writs shall be endorsed, as granted in purfuance of this act, and figned by the perion awarding them (r). 3. That on complaint and request in writing by or on behalf of any person committed and charged with an crime (unless committed for treason or felony expressed in the warrant, or for suspicion of the same, or as accessor thereto before the fact, or convicted or charged into executive on by legal process) the lord chancellor or any of the twent judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the partyle neglected for two terms to apply to any court for his enlarge ment) award a babeas corpus for fuch prisoner, returnablem mediately before himself or any other of the judges: an upon the return made shall discharge the party, if bailable upon giving fecurity to appear and answer to the accusation in the proper court of judicature. 4. That officers an keepers neglecting to make due returns, or not delivering the prisoner or his agent within fix hours after demand an py of the warrant of commitment, or shifting the custody a prisoner from one to another, without sufficient reasons authority (specified in the act) shall for the first offence forth 100l. and for the second offence 200l. to the party grieve and be disabled to hold his office. 5. That no person, on delivered by babeas corpus, shall be recommitted for the same offence, on penalty of 500l. 6. That every perfe committed for treason or felony shall, if he requires it first week of the next term, or the first day of the next selle of oyer and terminer, be indicted in that term or fession, else admitted to bail; unless the king's witnesses cam be produced at that time: and if acquitted, or if not dicted and tried in the second term or fession, he shall discharged from his imprisonment for such imputed offen but that no person, after the affises shall be opened for

⁽r) These two clauses seem to be transposed, and should perly be placed after the following provisions.

unty in which he is detained, shall be removed by baas corpus, till after the affifes are ended; but shall be left the justice of the judges of affise. 7. That any such foner may move for and obtain his babeas corpus as ll out of the chancery or exchequer, as out of the king's nch or common pleas; and the lord chancellor or judges nying the same, on fight of the warrant or oath that the ne is refused, forfeit severally to the party grieved the sum 500l. 8. That this writ of babeas corpus shall run into counties palatine, cinque ports, and other privileged aces, and the islands of Jersey and Guernsey. 9 That no habitant of England (except persons contracting, or convicts aying, to be transported; or having committed some capital fence in the place to which they are fent) shall be fent priperto Scotland, Ireland, Jersey, Guernsey or any places bend the feas, within or without the king's dominions: on in that the party committing, his advisers, anders, and istants shall forfeit to the party grieved a sum not less than ol. to be recovered with treble cofts; shall be disabled to bear y office of trust or profit; shall incur the penalties of praemire; and shall be incapable of the king's pardon.

This is the substance of that great and important statute: iich extends (we may observe) only to the case of commitants for such criminal charge, as can produce no inconvenice to public justice by a temporary enlargement of the priner: all other cases of unjust imprisonment being lest to the beas corpus at common law. But even upon writs at the mmon law it is now expected by the court, agreeable to tient precedents (s) and the spirit of the act of parliament, at the writ should be immediately obeyed, without waiting rany alias or pluries; otherwise an attachment will issue which admirable regulations, judicial as well as parliamenty, the remedy is now complete for removing the injury of just and illegal confinement. A remedy the more necessary, because the oppression does not always arise from the illeture, but sometimes from the mere inattention, of govern-

as

21

ab

per fur

col

or Th

fha

for 13. fine

ma

inti fucl

with

his

t w

unle

drov

norf

agai

vorc wife,

coerc

ury, atisf

et ar

d a

prope

ank

(u)

b) La

ment. For it frequently happens in foreign countries, (and has happened in England during temporary suspensions (t) of the statute) that persons apprehended upon suspension have set fered long imprisonment merely because they were forgotten

THE satisfactory remedy for this injury of false impriorment is by an action of trespass, vi et armis, usually calle an action of false imprisonment; which is generally, and a most unavoidably, accompanied with a charge of assault and battery also: and therein the party shall recover damages so the injury he has received; and also the defendant is, as so all other injuries committed with force, or vi et armis, liable to pay a fine to the king for the violation of the public pear

III. With regard to the third absolute right of individuals or that of private property, though the enjoyment of it, who acquired, is strictly a personal right; yet as its nature an original and the means of its acquisition or loss, fell more directly under our second general division, of the right things; and as, of course, the wrongs that affect these right must be referred to the corresponding division in the present book of our commentaries; I conceive it will be more commodious and easy to consider together, rather than in a separativity, the injuries that may be offered to the enjoyment, well as to the rights, of property. And therefore I shall be conclude the head of injuries affecting the absolute rights individuals.

WE are next to contemplate those which affect their relative rights; or such as are incident to persons considered a members of society, and connected to each other by various ties and relations: and, in particular, such injuries as may done to persons under the four following relations; hubbat and wife, parent and child, guardian and ward, master as fervant.

I. INJURIE

⁽t) See Vol. I. pag. 136.

18

I. INJURIES that may be offered to a person, considered as a husband, are principally three: abduction, or taking away aman's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her. 1. As to the first fort, abduction or taking her away, this may either be by fraud and persuasion, or open violence: though the law in both cases supposes force and constraint, the wife having no power to consent; and therefore gives a remedy by a writ of ravishment, or action of trespass vi et armis, de uxore rapta et abducta (u). This action lay at the common law; and thereby the husband hall recover, not the possession (w) of his wife, but damages for taking her away : and by statute Westm. . 3. Edw. I. c. 13. the offender shall also be imprisoned two years, and be fined at the pleasure of the king. Both the king and husband may therefore have this action (x): and the husband is also ntitled to recover damages in an action on the case, against such as persuade and intice the wife to live separate from him without a sufficient cause (y). The old law was so strict in his point, that, if one's wife missed her way upon the road, twas not lawful for another man to take her into his house, unless she was benighted and in danger of being lost or drowned (z); but a stranger might carry her behind him on torseback to market, to a justice of the peace for a warrant against her husband, or to the spiritual court to sue for a divorce (a). 2. Adultery, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the toercion of the spiritual courts; yet, considered as a civil inury, (and furely there can be no greater) the law gives a atisfaction to the husband for it by an action of trespass vi t armis against the adulterer, wherein the damages recoverd are usually very large and exemplary. But these are properly increased or diminished by circumstances (b); as the ank and fortune of the plaintiff and defendant; the relation

⁽u) F. N. B. 89. (w) 2 Inft. 434. (x) Ibid. (y) Law of nision, 74. (z) Bro. Abr. t. trespass. 213. (a) Ibid. 207. 440. b) Law of nisi prius. 26.

na

r,

n

nd

0

vhe

An

vhi

rua

ntit

ake

he oca

var

offe

e is

peed

ppli

uar

nfar

2 C

n ai

heir

ene

IV

ccru

The

xpir

(e)

. 13

tion or connection between them; the seduction or otherwise of the wife, founded on her previous behaviour and character; and the husband's obligation by settlement or otherwise to provide for those children, which he cannot but suspect to be spurious. 3. The third injury is that of beating a man's wife or otherwise ill using her; for which, if it be a common affault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass vi et armin, which must be brought in the names of the husband and wife jointly: but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and affistance of his wife, the law then gives him a separate remedy, by an action upon the case for this ill usage, per quod consortium amisst, in which he shall recovera statisfaction in damages (c).

II. INJURIES that may be offered to a person considered in the relation of a parent are likewise of two kinds; 1. Ab. duction, or taking his children away; and 2. Marrying his fon and heir without the father's confent, whereby during the continuance of the military tenures, he lost the value of his marriage. But this last injury is now ceased, together with the right upon which it was grounded: for, the father being no longer entitled to the value of the marriage, the marrying his heir does him no fort of injury, for which a civil action will lie. As to the other, of abduction or taking away the children from the father, that is also a matter of doubt whether it be a civil injury, or no; for, before the abolition of the tenure in chivalry, it was equally a doubt whether an action would lie for taking and earrying away any other child belids the heir: fome holding that it would not, upon the supposition that the only ground or cause of action was losing the value of the heir's marriage; and o hers holding that an action would lie for taking away any of the children, for that the parent hath an interest in them all, to provide for their education (d). If therefore before the abolition of these tenures it was an injury to the father to take away the rest of his children, as

⁽c) Cro. Jac. 501. 538.

18

th

ng

ng

on

he

ner

the

ion

ion

ue

ion

paatiwas

vell

well as his heir, (as I am inclined to think it was) it still renains an injury, and is remediable by a writ of ravishment, or, action of trespass vi et armis, de filio, vel filia, rapto vel abducto (e); in the same manner as the husband may have it, in account of the abduction of his wife.

III. OF a fimilar nature to the last is the relation of guardian nd ward; and the like actions mutatis mutandis, as are given o fathers, the guardian also has for recovery of damages, when his ward is stolen or ravished away from him (f). And though guardianship in chivalry is now totally abolished. which was the only beneficial kind of guardianship to the uardian, yet the guardian in focage was always (g) and is still ntitled to an action of ravishment, if his ward or pupil be aken from him; but then he must account to his pupil for he damages which he so recovers (h). And, as guardian in brage was also intitled at common law to a writ of right of vard, de custodia terrae et haeredis, in order to recover the offession and custody of the infant (i), so I apprehend that e is still intitled to fue out this antiquated writ. But a more beedy and fummary method of redreffing all complaints reative to wards and guardians hath of late obtained, by an pplication to the court of chancery; which is the supreme vardian, and has the superintendent jurisdiction, of all the nfants in the kingdom. And it is expressly provided by statute 2 Car. II. c 24. that testamentary guardians may maintain n action of ravishment or trespass, for recovery of any of heir wards, and also for damages to be applied to the use and enefit of the infants (k).

IV. To the relation between master and servant, and the right cruing therefrom, there are two species of injuries incident. The one is, retaining a man's hired servant before his time is spired; the other, beating or confining him in such a manner that

⁽e) F. N. B. 90. (f) Ibid. 139. (g) Ibid. (h) Hale on F. N. 139. (i) F. N. B. ibid. (k) 2 P. Wms. 108.

e I

that he is not able to perform his work. As to the first; the retaining another person's servant during the time he ha agreed to serve his present master; this, as it is an ungentle manlike, fo it is also an illegal act. For every master has by his contract purchased, for a valuable consideration, the service of his domestics for a limited time : the inveigling or him his fervant, which induces a breach of this contract, is therefore an injury to the master; and for that injury the law has given him a remedy by a special action on the case: and he may also have an action against the servant for the non-performance of his agreement (1). But, if the new master was not apprized of the former contract, no action lies against bim (m), unless he refuses to restore the servant upon demand. The other point of injury, is that of beating, confining, or disabling a man's servant, which depends upon the same principle as the last; viz. the property which the master has by his contract acquired in the labour of the fervant. In this cale, besides the remedy of an action of battery or imprisonment which the servant himself as an individual may have against the aggressor, the master also, as a recompence for bis immediate loss, may maintain an action of trespass, vi et armis; which he must allege and prove the special damage he has fustained by the beating of his servant, per quod servitim amisit (n): and then the jury will make him a proportionable pecuniary satisfaction. A similar practice to which, we find also to have obtained among the Athenians; where masters were entitled to an action against such as beat or ill treated their fervants (o).

WE may observe that, in these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or a least the advantages accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior hath no kind of properly in the company, care, or affishance of the superior, as the superior, as the superior.

⁽¹⁾ F. N. B. 167. (m) Ibid. Winch. 51. (n) 9 Rep. 113. 10 Rep. 130. (o) Pott. Antiqu. b. 1. c. 26.

d. or n-

has

rat

fu-

rior

or is held to have in those of the inferior; and therefore inferior can suffer no loss or injury. The wife cannot wer damages for beating her husband, for she hath no sepainterest in any thing during her coverture. The child have property in his father or guardian; as they have in for the sake of giving him education and nurture. Yet wife or the child, if the husband or parent be slain, have a cliar species of criminal prosecution allowed them, in the are of a civil satisfaction; which is called an appeal, and che will be considered in the next book. And so the sert, whose master is disabled, does not thereby lose his mainance or wages. He had no property in his master; and, a receives his part of the stipulated contract, he suffers no ry, and is therefore intitled to no action, for any battery mprisonment which such master may happen to endure.

us individuals, or as relaced to each other parallel the chart of on the disculsorable form in taken on the color of more reconstant with the remodules of the base

alle a divergia que la sere formida actuale un tre el següer se la mese a al deposición de la figura de secución de forma

College of seriond pictory in synthes

performistration for goes, and from the conservamissible and true Jacpeter, which confirs on its tree is conserved fixed, that is not cable as in the

CHAPTER

Me the seller in the tent

1000 100 (0)

e and the first transfer are no arrive at worst to a few and the second transfer at the sec

nts

e g

irat

fio:

of

rce i

ed f

prop

tcu

hich

re of

THE

ry, t

has

on of res fo

Hed b

ascrib

sobta

OL. I

CHAPTER THE NINTH.

OF INJURIES TO PERSONAL PROPERT

on but each town is another hand to the act town

Agra Norgen a realized a sport of the Papiers Historia

IN the preceding chapter we considered the wrongs or juries that affected the rights of persons, either consideration as individuals, or as related to each other; and are at presto enter upon the discussion of such injuries as affect their of property, together with the remedies which the law given to repair or redress them.

And here again we must follow our former division (a property into personal and real: personal, which consist goods, money, and all other moveable chattels, and the thereunto incident; a property, which may attend a magnetic person wherever he goes, and from thence receives its demination: and real property, which consists of such thing are permanent, fixed, and immoveable; as lands, tenement and hereditaments of all kinds, which are not annexed to person, nor can be moved from the place in which they said

FIRST then we are to consider the injuries that may be fered to the rights of personal property; and, of these, the rights of personal property in possession, and then that are in action only (b).

⁽a) See book II. ch. 2.

m

s de

eme

d to

y ful

y b

ese,

en

1.

The rights of personal property in possession are liable to species of injuries: the amotion or deprivation of that possion; and the abuse or damage of the chattels, while the possion continues in the legal owner. The former, or deprision of possession, is also divisible into two branches; the untand unlawful taking them away; and the unjust detaining m, though the original taking might be lawful.

AND first of an unlawful taking. The right of property all external things being folely acquired by occupancy, as been formerly stated, and preserved and transferred by nts, deeds, and wills, which are a continuation of that occucy; it follows as a necessary consequence, that when I once e gained a rightful possession of any goods or chattels, eiby a just occupancy or by a legal transfer, whoever either raud or force dispossesses me of them is guilty of a transfion against the law of society, which is a kind of secondary of nature. For there must be an end of all social comce between man and man, unless private possessions be seed from unjust invasions: and, if an acquisition of goods either force or fraud were allowed to be a sufficient title, property would foon be confined to the most strong, or the fcunning, and the weak and fimple minded part of mankind ich is by far the most numerous division) could never be re of their possessions.

THE wrongful taking of goods being thus most clearly an my, the next consideration is, what remedy the law of Englass given for it. And this is, in the first place, the restion of the goods themselves so wrongfully taken, with dages for the loss sustained by such unjust invasion; which is sted by action of replevin: an institution, which the mirror ascribes to Glanvil, chief justice to king Henry the second. Is obtains only in one instance of an unlawful taking, that of. III.

ic

ta

iv

up

wh

of .

ha

out

to t

mat

edi

ong

For

wit

tely

he g

her

nak

ose

o th

iver

. I.

he d

or pla

ned a

urpo

des t

he fta

repl pretie hich

> (i) S (m)

a wrongful distress; and this and the action of detinue (d which I shall presently say more) are almost the only actions, in which the actual specific possession of the identical person chattel is restored to the proper owner. For things person are looked upon by the law as of a nature fo transitory and perishable, that it is for the most part impossible either to a certain their identity, or to restore them in the same condition as when they came to the hands of the wrongful possessor And fince it is a maxim that " lex neminem cogit ad vana, la " impossibilia," it therefore contents itself in general with the floring, not the thing itself, but a pecuniary equivalent to the party injured, by giving him a fatisfaction in damages, But in the case of a diffress, the goods are from the first taking in the custody of the law, and not merely in that of the distreinors and therefore they may not only be identified, but also reftore to the first possessor, without any material change in their condition. And, being thus in the custody of the law, the taking them back by force is looked upon as an atrocious injury and denominated a rescous, for which the diffreinor has an medy in damages, either by writ of rescous (d), in case the were going to the pound, or by writ de parco fracto, or pound breach (e), in case they were actually impounded. He may also at his option bring an action on the case for this injury and shall therein, if the diffress were taken for rent, recover treble damages (f). The term, rescous, is likewise applied the forcible delivery of a defendant, when arrested, from the officer who is carrying him to prison. In which circumstance the plaintiff has a fimilar remedy by action on the case, of rescous (g): or, if the theriff makes a return of such reson to the court out of which the process issued, the rescuer wi be punished by attachment. (h).

⁽d) F. N. B. 101. (e) Ibid 100. (g) 6 Mod. 211. M. Seff. 1. c. 5. Salk. 586:

⁽f) Stat. z W.

⁽h) Cro. Jac. 419

CON

WI

A

419

An action of replevin, the regular way of contesting the validity of the transaction, is founded, I said, upon a distress taken wrongfully and without sufficient cause: being a re-delivery of the pledge (i), or thing taken in diffres, to the owner; upon his giving security to try the right of distress, and to restore tif the right be adjudged against him (k). And formerly, when the party distreshed upon intended to dispute the right of the diffress, he hath no other process by the old common law han by a writ of replevin, replegiari facias (1); which issued out of chancery, commanding the sheriff to deliver the diffress to the owner, and afterwards to do justice in respect of the natter in dispute in his own county-court. But this being a edious method of proceeding, the beafts or other goods were ong detained from the owner, to his great loss and damage (m). for which reason the statute of Marlbridge (n) directs, that (without fuing a writ out of chancery) the sheriff, immeditely upon complaint to him made, shall proceed to replevy he goods. And, for the greater ease of the parties, it is farher provided by flatute i P. & M. c. 12. that the sheriff shall make at least four deputies in each county, for the fole purofe of making replevins. Upon application therefore, either o the sheriff, or one of his faid deputies, fecurity is to be iven, in pursuance of the statute of Westm. 2. 13 Edw. I. c. . 1. That the party replevying will purfue his action against he distreinor, for which purpose he puts in plegios de prosequendo, r pledges to prosecute; and, 2. That if the right be determited against him, he will return the distress again; for which urpose he is also bound to find plegios de retorno habendo. Bedes these pledges, which are merely discretionary in the sheriff. he statute 11 Geo. II. c. 19. requires that the officer, ganting replevin on a distress for rent, shall take a bond with two weties in a fum of double the value of the goods diffreined; hich bond shall be affigned to the avowant or person making G 2 cognizance.

⁽i) See pag. 13. (k) Co. Litt. 145. (l) F. N. B. 68. (m) 2 Inft. 139. (n) 52 Hen. III. c. 21.

co

cai

hal

no

tak

wif mag

righ

that

was

(s)

9. 7

. 10. he te

ftuc

al ch

ibili,

uellic gibil

(x) 2 (a) 2

cognizance, on request made to the sheriff, and, if forfeited. may be fued in the name of the affignee. And certainly, as the end of all distresses is only to compel the party distreined upon to fatisfy the debt or duty owing from him, this end is as well answered by such sufficient sureties as by retaining the very diffress, which might frequently occasion great inconvemence to the owner; and that the law never wantonly inflicts. The sheriff, on receiving such security, is immediately, by his officers, to cause the chattels taken in diffress to be restored into the possession of the party distreined upon; unless the diffreinor claims a property in the goods fo taken. For if by this method of diftress, the diftreinor happens to come again into possession of his own property in goods which before he had loft, the law allows him to keep them, without any reference to the manner by which he thus has regained poffession: being a kind of personal remitter (o). If therefore the diffreinor claims any fuch property, the party replevying must sue out a writ de proprietate probanda, in which the sheriff is to try, by an inquest, in whom the property previous to the distress fubfifted (p). And if it be found to be in the diffreinor, the fheriff can proceed no farther; but must return the claim of property to the court of king's bench or common pleas, to be there farther profecuted, if thought advisable, and there finly determined (q).

But if no claim of property be put in, or if (upon trial) the sheriff's inquest determines it against the distreinor; then the sheriff is to replevy the goods (making use of even force, if the distreinor makes resistance) (r) in case the goods be found within his county. But if the distress be carried out of the county, or concealed, then the sheriff may return that the goods or beasts, are eloigned, elongata, carried to a distance, to places to him unknown: and thereupon the party replevying shall have a writ of capias in withernam, or in vetito namio; a term which

⁽o) See pag. 19. 145. Finch, L. 450.

⁽p) Finch. L. 316. (r) 2 Inft. 193.

⁽q) Co. Litt.

f

e

1)

en

ce,

nd the

ods

ces

ıall

erm

ich

Litt.

they used bed air

which fignifies a second or reciprocal distress (s), in lieu of the first which was eloigned. It is therefore a command to the sheriff to take other goods of the distressor, in lieu of the distress formerly taken, and eloigned, or withheld from the owner (t). So that here is now distress against distress; one being taken to answer the other, by way of reprisal (u), and as a punishment for the illegal behaviour of the original distressor. For which reason goods taken in withernam cannot be replevied, till the original distress is forthcoming (w).

But, in common cases, the goods are delivered back to the party replevying, who is then bound to bring his action of replevin; which may be profecuted in the county court, be the diffress of what value it may (x). But either party may remove it to the superior courts; the plaintiff at pleasure, the defendant upon reasonable cause (y): and also if in the course of proceeding any right of freehold comes in question, the sheriff can proceed no farther (z); so that it is usual to carry it up in the first instance to the courts of Westminsterhall. Upon this action brought, the distreinor, who is now the defendant, makes avowry; that is, he avows taking the distress in his own right, or the right of his wife (a); and fets forth the reason of it, as for rent arrere, damage done, or other cause: or else, if he justifies in another's right, as his bailiff or fervant, he is faid to make cognizance; that is, he acknowleges the taking, but infifts that fuch taking was legal, as he acted by the command of one who had a right Garage to Garage to my former

⁽s) Smith's commonw. b. 3. c. 10. 2 Inst. 141. (t) F. N. B. 19.73. (u) In the old northern languages the word withername suited as equivalent to reprifals. (Stiernhook, de jure Sueon. l. 1. 10.) (w) Raym. 475. The substance of this rule composed he terms of that samous question, which sir Thomas More (when student on his travels) is said to have puzzled a pragmatical profilor in the university of Bruges in Flanders, who gave a university challenge to dispute with any person in any science: in omnibility, et de question ente. Upon which Mr. More sent him this uestion universal carucae, capta in vetito namio, sint irreplatibilia;" whether beasts of the plough, taken in withernam, te incapable of being replevied. (Hoddesd. c. 5.)

⁽x) 2 Infl. 139. (y) F. N. B. 69.70. (z) 2 Finch. L. 317. (a) 2 Saund. 105.

n

an

m

he

an

he

gu.

tet

ufce

t r

can

can

n a

in o

only

he rery

perty .T

ne (

enda

ate !

eme ally

he le

ump

enda tfelf

ftro

TH

ction

uch p

to diffrein: and on the truth and legal merits of this avowr or cognizance the cause is determined. If it be determined for the plaintiff; viz. that the diftress was wrongfully taken, he has already got his goods back into his own possession, and shall keep them, and moreover recover damages (b). But if the defendant prevails, and obtains judgment that the diffres was legal, then he shall have a writ de retorno habenda whereby the goods or chattels (which were diffreined and the replevied) are returned again into his custody; to be fold, or otherwise disposed of, as if no replevin had been made. On in case of rent-arrere, he may have a writ to enquire into the value of the distress by a jury, and shall recover the amount of it in damages, if less than the arrear of rent; or, if more then fo much as shall be equal to such arrere : and, if the diftress be insufficient, he may take a farther distress or distress fes (c) : but otherwise, if, pending a replevin for a former distress, a man distreins again for the same rent or service, then the party is not driven to his action of replevin, but hall - have a writ of recaption (d), and recover damages for the defendant's contempt of the process of the law.

In like manner, other remedies for other unlawful taking of a man's goods, confift only in recovering a fatisfaction in damages. As if a man take the goods of another out of his actual or virtual possession, without having a lawful title so edo, it is an injury; which, though it doth not amount to felon unless it be done animo furandi, is nevertheless a transgression for which an action of trespass vi et armis will lie; wherein the plaintiff shall not recover the thing itself, but only da mages for the loss of it. Or, if committed without force the party may, at his choice, have another remedy inda mages by action of trover and conversion, of which I ha presently say more.

2. DEPRIVATION of possession may also be by an unjust de tainer of another's goods, though the original taking was lawful

(d) F

(e) I (h) 1

⁽b) F. N. B. 69. (c) Stat. 17. Car. II, c. 7. N. B. 71.

1

ce,

ngs in

his

oto

ony

ion,

rein

da-

da-

Mal

A de

wful

d) F

Asif I diffrein another's cattle damage-feafant, and he renders me fufficient amends; now, though the original taking was awful, my fubsequent detainment of them after tender of amends is wrongful, and he shall have an action of replevin against me to recover them (e) : in which he shall recover damages only for the detention and not for the caption, because : he original taking was lawful. Or, if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in . he detaining, and not in the original taking; and the rerular method for me to recover possession is by action of detinue (f), In this action of detinue, it is necessary to scertain the thing detained, in such a manner as that t may be specifically known and recovered. Therefore it annot be brought for money, corn, or the like: for that annot be known from other money or corn; unless it be n a bag or a fack, for then it may be diftinguishably marked. n order therefore to ground an action of detinue, which is mly for the detaining, these points are necessary (g): 1. That he defendant came lawfully by the goods, as either by deliery to him, or finding them; 2. That the plaintiff have a proerty; 3. That the goods themselves be of some value; and . That they be ascertained in point of identity. But there is me difadvantage which attends this action; viz. that the deendant is herein permitted to wage his law, that is, to exculate himself by oath (h), and thereby defeat the plaintiff of his anedy: which privilege is grounded on the confidence origially reposed in the bailee by the bailor, in the borrower by he lender, and the like; from whence arose a strong preumptive evidence, that in the plaintiff's own opinion the deendant was worthy of credit. But for this reason the action felf is of late much difused, and has given place to the action f trover.

This action, of trover and conversion, was in its original an ction of trespass upon the case, for recovery of damages against where the case and sound another's goods, and refused to deliver G 4.

⁽e) F. N. B. 69. (h) Ibid 295.

⁽f) Ibid 138.

⁽g) Co. Litt. 286.

-

C

0

ju

bi

fh

pr

al

his

the

a c

ryi

que

91

fon

gar

and

whi

viol

exte

whi

luce

WO

ont

he s

E

ove

1.

erta

ate !

d on

nd c

(m)

m on demand, but converted them to his own use; from which finding and converting it is called an action of trova and conversion. The freedom of this action from a wager law, and the less degree of certainty requisite in describing the goods (i), gave it so considerable an advantage overthe action of detinue, that by a fiction of law actions of trove were at length permitted to be brought against any man who had in his possession by any means whatsoever the perfonal goods of another, and fold them or used them without the consent of the owner, or refused to deliver them who demanded. The injury lies in the conversion : for any ma may take the goods of another into possession, if he find them; but no finder is allowed to acquire a property therein unless the owner be for ever unknown (k) : and therefore must not convert them to his own use, which the law prefumes him to do, if he refuses to restore them to the owner for which reason such refusal alone is prime facie, sufficient evidence of a conversion (1). The fact of the finding, orm ver, is therefore now totally immaterial: for the plaintiff need only to fuggest (as words of form) that he lost fuch goods, at that the defendant found them; and, if he proves that the goods are bis property, and that the defendant had them i his possession, it is sufficient. But a conversion must be full proved: and then in this action the plaintiff shall record damages, equal to the value of the thing converted, but no the thing itself; which nothing will recover but an action detinue or replevin.

As to the damage that may be offered to things perforal while in the possession of the owner, as hunting a man's det shooting his dogs, possessioning his cattle, or in any wise taking from the value of any of his chattels, or making them in a work condition than before, these are injuries too obvious to needed plication. I have only therefore to mention the remedies given by the law to redress them, which are in two shapes: by action of trespass vi et armis, where the act is in itself immediately in jurious.

(1) 10 Rep. 56.

^{[(}i) Salk. 654. (k) See Book I. c. 8. book II. ch. 1. & 1

re-

ien

eed

and

1 1

ully

ove

t no

on o

onal

deer

from

work

lex-

given

ction

riou

Br 26

jurious to another's property, and therefore necessarily accompanied with some degree of force; and by special action on the case, where the act is in itself indifferent, and the injury only consequential, and therefore arising without any breach of the peace. In both of which suits the plaintist shall recover damages, in proportion to the injury which he proves that his property has sustained. And it is not material whether the damage be done by the defendant himself, or his servants by his direction; for the action will lie against the master as well as the servant (m). And, if a man keeps a dog or other brute animal, used to do mischief, as by worrying sheep, or the like, the owner must answer for the consequences, if he knows of such evil habit (n).

II. HIT HER TO of injuries affecting the right of things perfonal, in peffection. We are next to consider those which regard things in action only; or such rights as are founded on,
and arise from contracts; the nature and several divisions of
which were explained in the preceding volume (o). The
siolation, or non-performance, of these contracts might be
extended into as great a variety of wrongs, as the rights
which we then considered that I shall now endeavour to reduce them into a narrow compass, by here making only a
worseld division of contracts; viz. contracts express, and
contracts implied; and considering the injuries that arise from
the violation of each, and their respective remedies.

EXPRESS: contracts include three diftinct species; debts, s, ovenants, and promises.

1. The legal acceptation of debt, is a fum of money due by ertain and express agreement. As, by a bond for a determiate sum; a bill or note; a special bargain; or a rent reservion a lease; where the quantity is fixed and unalterable, and does not depend upon any after-calculation to settle it.

ment of bearing prof 5 working bevore the

(c) F. M. B. 100. (c) Secreption of H. M. C. C. (c)

⁽m) Noy's Max. c. 44. (n) Cro. Car. 254. 487. (o) See book &

ft

de

It

cr by

ter

for

OW

the

be

wh

niy

nei

the

twe

of c

may

act (

viola

vena

in a

or ca

brea

The non-payment of these is an injury, for which the proper remedy is by action of debt (p), to compel the performance of the contract and recover the specifical sum due (q). The is the shortest and surest remedy; particularly where the debt arifes upon a specialty, that is, upon a deed or infin ment under feal. So also, if I verbally agree to pay am -a certain price for a certain parcel of goods, and fail into performance, an action of debt lies against me; for this also a determinate contract : but if I agree for no fettled price I am not liable to an action of debt, but a special actions the case, according to the nature of my contract. And in deed actions of debt are now feldom brought but upon free contracts under feal: wherein the fum due is clearly a precifely expressed: for in case of such an action upon a sim ple contract, the plaintiff labours under two difficulties -Finit, the defendant has here the fame advantage as in action of detinue, that of waging his law, or purging him felf of the debt by oath, if he thinks proper (r). Second in an action of debt the plaintiff must recover the wholed she claims, or nothing at all affor the debtois one in eaufe of action, fixed and determined; and which therefor if the proof varies from the claim, cannot be looked upon the same contract whereof the performance is fued for. therefore I bring an action of debt for 30/. I am not at libe ty to prove a debt of 20%. and recover a verdict thereon (s) any more than if I bring an action of detinue for a horle, can thereby recover an ox. For I fail in the proof of the contract, which my action or complaint has alleged to specific, express, and determinate. But in an action on case, on what is called an indebitatus affumpfit, which is ! brought to compel a specific performance of the contract, to recover damages for its non-performance, the implied fumplit, and consequently the damages for the breach of are in their nature indeterminate; and will therefore ad and proportion themselves to the truth of the case whi shall be proved, without being confined to the precise mand stated in the declaration. For if any debt be prove

⁽p) F. N. B. 119. (q) See appendix, No. III. §. 1. (r) 4 Re 94. (s) Dyer. 219.

on

ibe

(s)

fe,

f th

to

is a

1,1

of

whi

rove

however less than the sum demanded, the law will raise a promise pro tanto, and the damages will of course be proportioned to the actual debt. So that I may declare that the defendant, being indebted to me in 301. undertook or promised to pay it, but failed; and lay my damages arising from such failure at what sum I please: and the jury will, according to the nature of my proof, allow me either the whole in damages, or any inferior sum.

THE form of the writ of debt is sometimes in the debet and detinet, and sometimes in the detinet only: that is, the writ flates, either that the defendant owes and unjustly detains the debt or thing in question, or only that he unjustly detains it. It is brought in the debet as well as detinet, when fued by one of the original contracting parties who personally gave the credit, against the other who personally incurred the debt, as by the obligee against the obligor, the landlord against the tenant, &c. But, if it be brought by or against an executor. for a debt due to or from the testator, this, not being his own debt, shall be fued for in the detinet only (t). So also if the action be for goods, for corn, or an horse, the writ shall bein the detinet only; for nothing but a fum of money, for which I have personally contracted, is properly confidered as my debt. And indeed a writ of debt in the detinet only, is neither more nor less than a mere writ of detinue: it might therefore perhaps be more easy (instead of distinguishing between the debet and detinet, and the detinet only, in an action ... of debt) to fay at once that in the one case an action of debt may be had, in the other an action of detinue.

2. A COVENANT also, contained in a deed, to do a direct act or to omitone, is another species of express contracts, the violation or breach of which is a civil injury. As if a man covenants to be at York by such a day, or not to exercise a trade in a particular place, and is not at York at the time appointed, or carries on his trade in the place forbidden, these are direct breaches of his covenant, and may be perhaps greatly to the disadvantage

a

he ot

an all

lair

e.

aiu

mit

gain

nder

sfac

e ca

e de

ife e

ing

y no

day (

on la

) ma

ains 1 press

ey ou

prov

perj uds a

e follo

bund :

2) Bro

disadvantage and loss of the covenantee. The remedy for this is by a writ of covenant (u); which directs the theriff command the defendant generally to keep his covenant with the plaintiff (without specifying the nature of the covenant or shew good cause to the contrary: and if he continues n fractory, or the covenant is already so broken that it cannot now be specifically performed, then the subsequent proceed ings fet forth with precision the covenant, the breach, an the loss which has happened thereby; whereupon the jur will give damages, in proportion to the injury fustained h the plaintiff, and occasioned by such breach of the defendant contract.

THERE is one species of covenant, of a different natur from the rest; and that is a covenant real, to convey or di pose of lands, which seems to be partly of a personal as partly of a real nature (w). For this the remedy is by a fe cial writ of covenant, for a specific performance of the on tract, concerning certain lands particularly described inth writ. It therefore directs the sheriff to command the de findant, here called the deforciant, to keep the covena made between the plaintiff and him concerning the identic lands in question: and upon this process it is that fines land are usually levied at common law (x); the plaintiff, person to whom the fine is levied, bringing a writ of con nant, in which he fuggefts fome agreement to have be made between him and the deforciant, touching these part cular lands, for the completion of which he brings this action And, for the end of this supposed difference, the fine or, nalis oncurdia is made, whereby the deforciant (now call the cognizor) acknowleges the tenements to be the right oft plant if, now called the cognizee. And moreover, as lea for years were formerly confidered only as contracts (or cove ants for the enjoyment of the rents and profits, a not as the conveyance of any real interest in the land, t antient remady for the lessee, if ejected, was by writ covenant against the lessor, to recover the term (if in being dum

⁽¹¹⁾ F. N. B. 145. (w) Hal. on F. N. B. 146. (x) See bo 11. ch. 21. (y) Ibid. ch. 9.

COL 1 th

nar

ntic

es c ff,

COV

bee

part

Ctio

10

call oft

lead As (

s, a id, t vrit

ee bo

and damages, in case the ouster was committed by the leffer himself; or, if the term was expired, or the ouster was committed by a stranger, then to recover damages only (z).

3. A PROMISE is, in the nature of a verbal covenant, and vants nothing but the folemnity of writing and fealing to make tabsolutely the same. If therefore it be to do any explicit A, it is an express contract, as much as any covenant; and he breach of it is an equal injury. The remedy indeed is ot exactly the same: since, instead of an action of coveant, there only lies an action upon the case, for what is alled the affum that or undertaking of the defendant; the failre of performing which is the wrong or injury done to the laintiff, the damages whereof a jury are to estimate and setde. As if a builder promises, undertakes, or assumes to aius, that he will build and cover his house within a time mited, and fails to do it; Caius has an action on the cafe rainst the builder, for this breach of his express promise, idertaking, or affumpfit; and shall recover a pecuniary fasfaction for the injury sustained by such delay. So also in e case before-mentioned, of a debt by simple contract, if e debtor promifes to pay it and does not, this breach of proise entitles the creditor to his action on the case, instead of ing driven to an action of debt. Thus likewise a promisy note, or note of hand not under feal, to pay money at day certain, is an express assumplit; and the payee at comon law, or by custom and act of parliament the indorsee. may recover the value of the note in damages, if it reains unpaid. Some agreements indeed, though ever fo pressly made, are deemed of so important a nature, that by ought not to rest in verbal promise only, which cannot proved but by the memory (which sometimes will induce perjury) of witnesses. To prevent which, the statute of uds and perjuries, 29 Car. II. c. 3. enacts, that in the following cases no verbal promise shall be fusficient to ound an action upon, but at the least some note or memobeing udum of it shall be made in writing, and signed by the party to

²⁾ Bro. Abr. t. covenant. 33. F. N. B. 145. (a) See book II.

he

bŧ

CO

d

oa

ON

Et

m

vat

bo

on a

bin

V:

ury

rer

TH

nal f

ture The

ct of

v the

ie uf

) 1 R p. 64

nistrator promises to answer damages out of his own that 2. Where a man undertakes to answer for the debt, defau or miscarriage of another. 3. Where any agreement made, upon consideration of marriage. 4. Where any tract or sale is made of lands, tenements, or hereditament or any interest therein. 5. And, lastly, where there is a agreement that is not to be performed within a year in the making thereof. In all these cases a mere verbal as a world.

FROM these express contracts the transition is easy to that are only implied by law. Which are such as reason justice dictate, and which therefore the law presumes a every man has contracted to perform; and, upon this sumption, makes him answerable to such persons, as suffer his non-performance.

OF this nature are, first, such as are necessarily implied the fundamental constitution of government, to whicher man is a contracting party. And thus it is that every perform bound and hath virtually agreed to pay fuch particular fur money, as are charged on him by the fentence, or affells the interpretation of the law. For it is a part of the one contract, entered into by all mankind who partake the be of fociety, to fubmit in all points to the municipal confi ons and local ordinances of that state, of which each in dual is a member. Whatever therefore the laws order any to pay, that becomes instantly a debt, which he hath be hand contracted to discharge. And this implied agreement is that gives the plaintiff a right to institute a second a founded merely on the general contract, in order to me fuch damages, or fum of money, as are affested by the and adjudged by the court to be due from the defendant plaintiff in any former action. So that if he hath one tained a judgment against another for a certain sum, and glects to take out execution thereupon, he may after

rfo

gi. is m

bef

he

itt

nee

ing an action of debt upon this judgment (b), and shall not put upon the proof of the original cause of action; but on shewing the judgment once obtained, still in full force. d yet unfatisfied, the law immediately implies, that by the iginal contract of fociety the defendant hath contracted a bt, and is bound to pay it. This method feems to have en invented, when real actions were more in use than at efent, and damages were permitted to be recovered there. ; in order to have the benefit of a writ of capias to take edefendant's body in execution for those damages, which ocess was allowable in an action of debt (in consequence of estatute 25 Edw. III. c. 17.) but not in an action real. herefore, fince the difuse of those real actions, actions of bt upon judgment in personal fuits have been pretty much countenanced by the courts, as being generally vexatious d oppressive, by harrassing the defendant with the costs of oactions initead of one.

On the same principle it is, (of an implied original conet to submit to the rules of the community, whereof we emembers) that a forfeiture imposed by the by-laws and wate ordinances of a corporation upon any that belong to body, or an amercement set in a court-leet or court-baron on any of the suitors to the court (for otherwise it will notbinding) (c) immediately create a debt in the eye of the w: and such forfeiture or amercement, if unpaid, work an ury to the party or parties intitled to receive it; for which eremedy is by action of debt (d).

The same reason may with equal justice be applied to all hal statutes, that is, such acts of parliament whereby a forture is inflicted for transgressing the provisions therein enact. The party offending is here bound by the fundamental conct of society to obey the directions of the legislature, and the sortesture incurred to such persons as the law requires. The usual application of this forseiture is either to the party grieved.

¹¹ Roll. Abr. 600, 601. (c) Law of nife prins, 155. (d) 5 p. 64. Hob. 279.

A

ife

ive

e j

mp

ps

cai

ery

ui

1.

for

ned

egl

y b

ump

pay

r th

ich

his t

o wi

rited

. T

wh

take

eeing

ties d

uld 1

ordin

grieved, or else to any of the king's subjects in general. the former fort is the forfeiture inflicted by the statute Winchester (e) (explained and enforced by several subsequent statutes) (f) upon the hundred wherein a man is robb which is meant to oblige the hundredors to make hue and after the felon; for, if they take him, they stand excel But otherwise the party robbed is intitled to prosecute the by a special action on the case, for damages equivalent to lofs. And of the same nature is the action given by flat o Geo. I. c. 22. commonly called the black act, against inhabitants of any hundred, in order to make fatisfaction damages to all perfons who have fuffered by the offences of merated and made felony by that act. But, more usual thefe forfeitures created by statute are given at large, to common informer; or, in other words, to any fuch per or persons as will fue for the same : and hence such acid are called popular actions, because they are given to the me ple in general (g). Sometimes one part is given to the kin to the poor, or to some public use, and the other part to informer or profecutor; and then the fuit is called a quil action, because it is brought by a person " qui tam produ " no rege &c. quam pro seipso in hac parte sequitur." If king therefore himfelf commences this fuit, he shall have whole forfeiture (h). But if any one hath begun a qui tam, popular action, no other person can pursue it; and ther dict passed upon the defendant in the first suit is a bar to others, and conclusive even to the king himself. This frequently occasioned offenders to procure their own fre to begin a fuit, in order to forestall and prevent other a ons: which practice is in some measure prevented by a tute made in the reign of a very fharp-fighted prince in nal laws, 4 Hen. VII. c. 20. which enacts, that no reco ry, otherwise than by verdict, obtained by collusion in action popular, shall be a bar to any other action profecu A provision, that seems borrowed from the

⁽e) 13 Edw I c. 1. (f) 27 Eliz c. 13. 29 Car. II. c. 7. 80 II. c. 16. 22. Geo. II. c. 24. (g) See book II. ch. 29. (h) 2 Hi P. C. 268.

to

il

If

vel

211,

e v

to

is h

r ac

aí ini

eco

in

ecu

ie r

the Roman law, that if a person was acquitted of any acsation, merely by the prevarication of the accuser, a new ofecution might be commenced against him (i).

A SECOND class, of implied contracts, are such as do not ife from the express determination of any court, or the poive direction of any statute; but from natural reason, and e just construction of law. Which class extends to all premptive undertakings or assumptits; which, though never perps actually made, yet constantly arise from this general intended and intendment of the courts of judicature, that ery man hath engaged to perform what his duty or justice quires. Thus,

In If I employ a person to transact any business for me, or form any work, the law implies that I undertook, or assent to pay him so much as his labour deserved. And if reglect to make him amends, he has a remedy for this integlect to make him amends, he has a remedy for this implied implies: wherein he is at liberty to suggest that I promised pay him so much as he reasonably deserved, and then to a that his trouble was really worth such a particular sum, ich the desendant has omitted to pay. But this valuation his trouble is submitted to the determination of a jury; o will assess such a sum in damages as they think he really rited. This is called an assumpsit on a quantum meruit.

THERE is also an implied assumptit on a quantum valewhich is very similar to the former; being only where takes up goods or wares of a tradesman, without expressly teing for the price. There the law concludes, that both ties did intentionally agree, that the real value of the goods uld be paid; and an action on the case may be brought ordingly, if the vendee refuses to pay that value.

3. A THIRD

m

a

ay

n, th

in

m

by

d t

tle

he

but

be

el : feld

ng

psit

THion

und

Wi

inte

of

have

n on

r.

or a

nce;

or if

cafes

for d

oler is, o

n) Co

3. A THIRD species of implied assumpsits is when one had and received money belonging to another, without valuable confideration given on the receiver's part: for law construes this to be money had and received for them the owner only; and implies that the person so receiving mifed and undertook to account for it to the true proprie And, if he unjustly detains it, an action on the case lies an him for the breach of fuch implied promise and undertake and he will be made to repair the owner in damages, equ lent to what he has detained in fuch violation of his prom This is a very extensive and beneficial remedy, applicable almost every case where the defendant has received m which ex aequo et bono he ought to refund. It lies for mo paid by mistake, or on a confideration which happens to or through imposition, extortion, or oppression, or w undue advantage is taken of the plaintiff's fituation (k).

4. Where a person has laid out and expended his money for the use of another, at his request, the law in a promise of repayment, and an action will lie on assumptit (1).

merchants, or other persons, the law implies that he ag whom the ballance appears has engaged to pay it to the othough there be not any actual promise. And from implication it is frequent for actions on the case to brought, declaring that the plaintiff and defendant settled their accounts together, in simul computation, (we give name to this species of assumpsite) and that the defendence and to pay the plaintiff the ballance, but has neglected to do it. But if no account has been up, then the legal remedy is by bringing a writ of any de computo (m); commanding the defendant to render account to the plaintiff, or shew the court good cause to continue to the plaintiff, or shew the court good cause to continue to the plaintiff, or shew the court good cause to continue to the plaintiff, or shew the court good cause to continue to the plaintiff, or shew the court good cause to continue to the plaintiff, or shew the court good cause to continue to the plaintiff, or shew the court good cause to continue to the plaintiff, or shew the court good cause to continue to the plaintiff, or shew the court good cause to continue to the plaintiff, or shew the court good cause to continue to the plaintiff.

⁽k) 4 Burr. 1012. (l) Carth. 446. 2 Keb. 99. N. B. 116.

ary. In this action, if the plaintiff succeeds, there are two ments: the first is, that the defendant do account (quod ntet) before auditors appointed by the court; and, when account is finished, then the second judgment is, that he ay the plaintiff so much as he is found in arrere. This n, by the old common law (n), lay only against the parthemselves, and not their executors; because matters of intrested solely in their own knowlege. But this defect, many fruitless attempts in parliament, was at last remeby flatute 4 Ann, c. 16. which gives an action of account of the executors and administrators. But however it is by experience, that the most ready and effectual way the these matters of account is by bill in a court of equihere a discovery may be had on the defendant's oath, out relying merely on the evidence which the plaintiff be able to produce. Wherefore actions of account, to el a man to bring in and fettle his accounts, are now feldom used: though, when an account is once stated, ng is more common than an action upon the implied thit to pay the ballance.

THE last class of contracts, implied by reason and conion of law, arises upon this supposition, that every one undertakes any office, employment, truft, or duty, conwith those who employ or entrust him, to perform it integrity, diligence, and skill. And, if by his want of of those qualities any injury accrues to individuals, have therefore their remedy in damages by a special on the case. A few instances will fully illustrate this r. If an officer of the public is guilty of neglect of or a palpable breach of it, of non-feasance or of misace; as, if the sheriff does not execute a writ sent to or if he wilfully makes a false return thereof; in both cases the party aggrieved shall have an action on the for damages to be affested by a jury (o). If a sheriff oler suffers a prisoner, who is taken upon mesne process is, during the pendency of a fuit) to escape, he is liable

m

nt

(4

IS !

1

acc

er a

e to

onti

n) Co. Litt. 90.

⁽a) Moor 431. 11 Rep. 99.

na

fa

ch

TI

nd

it

b

116

0

a

fou

bbe

y a

be

ess

s. ,

hat

ah

, ui

ated

th

y fig

Alf

an e

et a

ik

ego:

ES

ly, e

N.

liable to an action on the case (p). But if, after judgm gaoler or a sheriff permits a debtor to escape, who is the in execution for a certain fum; the debt immediately be his own, and he is compellable by action of debt, being fum liquidated and afcertained, to fatisfy the creditor his demand: which doctrine is grounded (q) on the equity statutes of Westm. 2. 13 Edw. I. c. 11. and 1 Ric. II. An advocate or attorney that betray the cause of their or, being retained, neglect to appear at the trial, by the cau e miscarries, are liable to an action on the case, reparation to their injured client (r). There is also in ways an implied contract with a common inn-keep fecure his guest's goods in his inn; with a common or bargemaster, to be answerable for the goods he a with a common farrier, that he shoes a horse well, w laming him; with a common taylor, or other workman he performs his business in a workmanlike manner: in if they fail, an action on the case lies to recover damag fuch breach of their general undertaking (s). But if ploy a person to transact any of these concerns, whole mon profession and business it is not, the law implies in general undertaking; but in order to charge him with ges, a special agreement is required. Also if an innor other victualler, hangs out a fign and opens his hou travellers, it is an implied engagement to entertainally who travel that way; snd upon this universal affum action on the case will lie against him for damages, without good reason refuses to admit a traveller (t). one cheats me with false cards or dice, or by false weigh measures, or by selling me one commodity for anoth action on the case also lies against him for damages, up contract which the law always implies, that every trail is fair and honest (u). In contracts likewise for a is constantly understood that the seller undertakes commodity he fells is his own; and if it proves out

⁽p) Cro. Eliz. 625. Comb. 69. (q) Bro. Abr.l. ment. 19. 2 Inft. 382. (r) Finch. L. 188. (s) 1 54. 1 Saund. 324. (t) 1 Ventr. 333. (u) 10 Rep

on on the case lies against him, to exact damages for eit. In contracts for provisions it is always implied y are wholesome; and, if they be not, the same renay be had. Also if he, that selleth any thing, doth e fale warrant it to be good, the law annexes a tacit to this warranty, that if it be not fo, he shall make fation to the buyer: elfe it is an injury to good faith. ch an action on the case will lie to recover damages The warranty must be upon the fale; for if it be made nd not at the time of the fale, it is a void warranty: it is then made without any confideration; neither buyer then take the goods upon the credit of the venalso the warranty can only reach to things in being at of the warranty made, and not to things in future: a horse is sound at the buying of him; not that he found two years hence. But if the vendor knew the be unfound, and hath used any art to disguise them. y are in any shape different from what he represents be to the buyer, this artifice shall be equivalent to es warranty, and the vendor is answerable for their . Ageneral warranty will not extend to guard against hat are plainly and obviously the object of one's fena horse be warranted perfect, and wants either a tail unless the buyer in this case be blind. But if cloth ted to be of fuch a length, when it is not, there an the case lies for damages; for that cannot be disfight, but only by a collateral proof, the measuring Also if a horse is warranted sound, and he wants the an eye, though this seems to be the object of one's et as the discernment of fuch defects is frequently skill, it hath been held that an action on the case esover damages for this imposition (a).

in

128

if

ofe

the

n-k

11 p

umb

255,

eigh

oth

, up

rant or fa

s th

othe

(t.)

lep.

Es the special action on the case, there is also a peculy, entitled an action of deceit (b), to give damages in some

N. B. 94. (x) Finch. L. 189. (y) 2 Roll. (z) Finch. L. 189. (a) Salk. 611. (b) F.

fome particular cases of fraud; and principally where one does any thing in the name of another, by which he is doed or injured (c), as if one brings an action in another, and then suffers a nonsuit, whereby the plaining comes liable to costs: or where one suffers a fraudulent very of land or chattels to the prejudice of him that right. It also lies in the cases of warranty before-ment (d) and the other injuries committed contrary to good and honesty. But the action on the case, in nature of the source of the case, and honesty.

Thus much for the non-performance of contracts en or implied; which includes every possible injury to what far the most considerable species of personal property; that which consists in action merely, and not in possible Which sinishes our enquiries into such wrongs as maybe ed to personal property, with their several remedies by se action.

(c) Law of nife prius. 29.

(d) F. N. B. 98.

ha

e o

pal

and in taine the j

re re

CHAPTER THE TENTH.

INJURIES TO REAL PROPERTY, ID FIRST OF DISPOSSESSION, OR USTER, OF THE FREEHOLD.

ME now to consider such injuries as affect that spees of property which the laws of England have denomireal, as being of a more substantial and permanent nathan those transitory rights of which personal chattels e object.

98.

HA

AL injuries then, or injuries affecting real rights, are pally fix; 1. Ouster; 2. Trespass; 3. Nusance; 4. ; 5. Subtraction; 6. Disturbance.

ster, or dispossession, is a wrong or injury that carith it the emotion of possession: for thereby the wronggets into the actual occupation of the land or hereditaand obliges him that hath a right to seek his legal rein order to gain possession, and damages for the injuained. And such ouster, or dispossession, may either
the freehold, or of chattels real. Ouster of the freehold
ted by one of the following methods: 1. Abatement;
trusion; 3. Dissession; 4. Discontinuance; 5. DeforceAll of which in their order, and afterwards their re-

re remedies, will be confidered in the present chapter.

z. AND,

lu

nt

rí

a

is

to

is

or 1 rev

rs

n tl

wa

fim

wh

T

hold

that

y w

this

ing

OL.

) Co.

1. AND, first, an abatement is where a person dies seifel an inheritance, and before the heir or devisee enters, a for ger who has no right makes entry, and gets possession of freehold: this entry of him is called an abatement, and himself is denominated an abator (a). It is to be observed this expression, of abating, which is derived from the Fra and fignifies to quash, beat down, or destroy, is used by law in three fenses. The first, which seems to be the prin tive fense, is that of abating or beating down a nusance, which we fpoke in the beginning of this book (b); and like fense it is used in statute Westm. r. 3 Edw. I. c. where mention is made of abating a castle or fortres; which case it clearly fignifies to pull it down, and level it the ground. The second signification of abatement is that abating a writ or action, of which we shall say more here ter: here it is taken figuratively, and fignifies the overtine or defeating of such writ, by some fatal exception to it. I last species of abatement is that we have now before us; wh is also a figurative expression, to denote that the rightful of fession or freehold of the heir or devisee is overthrown by rude intervention of a stranger.

THIS abatement of a freehold is somewhat fimilar to immediate occupancy in a state of nature, which is estate by taking possession of the land the same instant that the or occupant by his death relinquishes it. But this hower agreeable to natural justice, considering man merely a individual, is diametrically opposite to the law of some and particularly the law of England: which, for the fervation of public peace, hath prohibited as far as poll all acquifitions by the mere occupancy; and hath directed lands, on the death of the present possessor, should to diately vest either in some person, expressly named and pointed by the deceased, as his devisee; or, on default fuch appointment, in fuch of his next relations as the hath felected and pointed out as his natural representative

⁽a) Finch. L. 195.

ere

whi

l p

by t

· to

ffed

he p

wey

as

ocie

ne p

tedt

tmi

ault

the l

Every entry therefore of a mere stranger, by way of evention between the ancestor and heir or person next end, which keeps the heir or devisee out of possession, is one the highest injuries to the rights of real property.

THE fecond species of injury by ouster, or amotion of Tession from the freehold, is by intrusion: which is the ry of a stranger, after a particular estate of freehold is denined, before him in remainder or revention. And it haps where a tenant for term of life dieth feifed of certain is and tenements, and a stranger entereth thereon, after death of the tenant, and before any entry of him in render or reversion (c). This entry and interpolition of the nger differ from an abatement in this; that an abatement lways to the prejudice of the heir, or immediate device; ntrusion is always to the prejudice of him in remainder or rion. For example; if A dies seised of lands in fee-simand, before the entry of B his heir, C enters thereon is an abatement; but if A be tenant for life, with remainto B in fee-simple, and, after the death of A, C enters, is an intrusion. Also if A be tenant for life on lease from or his ancestors, or be tenant by the curtefy, or in dower, reversion being vested in B; and after the death of A, C rs and keeps B out of possession, this is likewise an intru-So that an intrusion is always immediately confequent the determination of a particular estate; an abatement ways confequent upon the defcent or devise of an estate in imple. And in either case the injury is equally great to whose possession is defeated by this unlawful occupancy.

The third species of injury by ouster, or privation of the sold, is by disseifer. Disseisin is a wrongful putting out of that is seised of the freehold (d). The two former species of the ty were by a wrongful entry where the possession was vacant; this is an attack upon him who is in actual possession, and ing him out of it. Those were an ouster from a freehold of. III.

Co. Litt. 277. F. N. B. 203, 204. (d) Co. Litt. 277.

fe

0

w

ba

W

di

Ct

fol

die

dif

or

un

ted

ren

free

for

7

diffe

well

ful.

detai

4.

(h

happ of th

in law; this is an ouster from a freehold indeced. This be effected either in corporeal inheritances, or incorpor Diffeifin, of things corporeal, as of houses, land, &c. be by entry and actual dispossession of the freehold (e); a man enters either by force or fraud into the house of ther, and turns, or at least keeps, him and his fervants on possession. Diffeisin of incorporeal hereditaments cannot an actual dispossession; for the subject itself is neither a ble of actual bodily possession, nor dispossession; but it pends on their respective natures, and various kinds; be in general nothing more than a disturbance of the own the means of coming at, or enjoying them. With regard freehold rent in particular, our antient law-books (f) men five methods of working a diffeifin thereof: 1. By enclose where the tenant fo encloseth the house or land, that the cannot come to diffrein thereon, or demand it : 2. By fi faller, or lying in wait; when the tenant besetteth the with force and arms, or by menaces of bodily hurt affright lessor from coming: 3. By rescous; that is, either by lently retaking a diffress taken, or by preventing the with force and arms from taking any at all: 4. By replied when the tenant replevies the diffress at such time when rent is really due : 5. By denial; which is when the rent ing lawfully demanded is not paid. All, or any of these cumstances work a disseisin of rent: that is, they wrong put the owner out of the only possession of which the ject-matter is capable, namely, the receipt of it. An these diffeifins, of hereditaments incorporeal, are only the election and choice of the party injured; if, for the of more eafily trying the right, he is pleafed to suppose felf disseised (g). Otherwise, as there can be no actual possession, he cannot be compulsively disseised of any in poreal hereditament.

AND so too, even in corporeal hereditaments, a man frequently suppose himself to be disseised, when he is not

⁽e) Co. Litt. 181. (f) Finch. L. 165, 166. Litt. § 23/16 (g) Litt. §. 588, 589.

e k

le v

7.1

ne l

lev

hen

ent

efe

ngf

he I

And

ly

the l

ual y in

nan

not

23/1

fact, for the fake of intitling himself to the more easy and commodious remedy of an affife of novel diffeifin, (which will be explained in the fequel of this chapter) inftead of being driven to the more tedious process of a writ of entry (h). The true injury of compulsive diffeisin feems to be that of dispossessing the tenant, and substituting oneself to be the tenant of the lord in his stead; in order to which in the times of pure feodal tenure the consent or connivance of the lord. who upon every descent or alienation personally gave, and who therefore alone could change, the felin or investiture, feems to have been antiently necessary. But when in process of time the feodal form of alienations wore off, and the lord was no longer the inftrument of giving actual feifin, it is probable that the lord's acceptance of rent or fervice, from him who had dispossessed another, might constitute a complete diffeifin. Afterwards, no regard was had to the lord's concurrence, but the dispossessor himself was considered as the fole diffeifor: and this wrong was then allowed to be remedied by entry only, without any form of law, as against the diffeifor himfelf; but required a legal process against his heir or alienee. And when the remedy by affife was introduced under Henry II. to redrefs fuch diffeifins as had been committed within a few years next preceding, the facility of that remedy induced others, who were wrongfully kept out of the freehold, to feign or allow themselves to be diffeised, merely for the fake of the remedy.

THESE three species of injury, abatement, intrusion, and diseisin, are such wherein the entry of the tenant ab initio, as well as the continuance of his possession afterwards, is unlawful. But the two remaining species are where the entry of the tenant was at first lawful, but the wrong consists in the detaining of possession afterwards.

4. Such is, fourthly, the injury of discontinuance; which happens when he who hath an estate-tail, maketh a larger estate of the land than by law he is intitled to do (i): in which case H 2

⁽h) Hengh. parv. c. 7. 4. Burr. 110. (i) Finch. L. 190.

is is

r

101

ore

OV

d, or, vid

y v

han

r fo

end

he l

rm

on t

orce

fa o

heren

ich :

der

on,

ay a

if :

iene

Voic

(1) F 201.

the effate is good, fo far as his power extends who made i but no farther. As if tenant in tail makes a feofiment inte simple, or for the life of the feoffee, or in tail; all which are beyond his power to make, for that by the common laws. tends no farther than to make a leafe for his own life: he the entry of the feoffee is lawful during the life of the feoffer but if he retains the possession after the death of the faoffer it is an injury, which is termed a discontinuance; the antier legal estate, which ought to have survived to the heir in the being gone, or at least suspended, and for a while discontinu ed. For, in this case, on the death of the dienors, neith the heir in tail, nor they in remainder or reversion experien on the determination of the estate-tail, can enter on an poffess the lands so alienated. Also, by the common law the alienation of an husband who was feifed in the right of his wife, worked a discontinuance of the wife's estate: till the statute 32 Hen. VIII. c. 28. provided, that no act by the hul band alone should work a discontinuance of, or prejudice the inheritance or freehold of the wife; but that, after his death, the or her heirs may enter on the lands in quello Formerly also, if an alienation was made by a sole corpor tion, as a bishop or dean, without consent of the chapter this was a discontinuance (j). But this is now quite antiquate ed by the disabling statutes of I Eliz. c. 19. and 13 Eliz. 10. which declare all fuch alienations absolutely void abinit and therefore at present no discontinuance can be thereb occasioned.

5. THE fifth and last species of injuries by ouster or printion of the freehold, where the entry of the present tense or possession was originally lawful, but his detainer is not unlawful, is that by deforcement. This, in its most at tensive sense, is nomen generalissimum; a much larger as more comprehensive expression than any of the former it then signifying the holding of any lands or tensiments to which another person hath a right (k). I that this includes as well an abatement, an intrusion, dissess, or any other species of wrong dissess, or a discontinuance, or any other species of wrong dissess, or a discontinuance, or any other species of wrong dissess.

in the same and th

lice

ion

OF4

uat

Z. t

ereb

rive

enat

5.110

A ex

1 20

mer

ten

ion,

WTOI

oeve

whatfoever, whereby he that hath right to the freehold is kept ut of possession. But, as contradistinguished from the forner, it is only fuch a detainer of the freehold, from him that ath the right of property, but never had any possession under hat right, as falls within none of the injuries which we have efore explained. As in case where a lord hath a seignory, nd lands escheat to him propter defectum sanguinis, but the eiin of the lands is withheld from him: here the injury is ot abatement, for the right vests not in the lord as heir or deifee; nor is it intrusion, for it vests not in him in remainder reversion; nor is it disseisin, for the lord was never seised; or does it at all bear the nature of any species of discontinunce; but, being neither of these four, it is therefore a depreement (1). If a man marries a woman, and during the overture is seised of lands, and alienes, and dies; is disseifd, and dies; or dies in possession; and the alienee, disseior, or heir, enters on the tenements and doth not affign the idow her dower; this is also a deforcement to the widow, y withholding lands to which she hath a right (m). In like nanner, if a man lease lands to another for term of years, for the life of a third person, and the term expires by furender, efflux of time, or death of the ceftui que vie; and te leffee or any stranger, who was at the expiration of the rm in possession, holds over, and refuses to deliver the posseson to him in remainder or reversion, this is likewise a deprement (n). Deforcement may also arise upon the breach fa condition in law: as if a woman gives lands to a man y deed, to the intent that he marry her, and he will not when ereunto required, but continues to hold the lands: this is ch a fraud on the man's part, that the law will not allow it devest the woman's right; though it does devest the posseson, and thereby becomes a deforcement (o). Deforcements ay also be grounded on the disability of the party deforced: if an infant do make an alienation of his lands, and the enee enters and keeps possession; now, as the alienation voidable, this possession as against the infant (or, in case H 3

(1) F. N. B. 143. (m) Ibid. 8. 147. (n) Finch. L. 265. F. N. 201. 203, 6, 7. (o) F. N. B. 205.

tr

f

2

ffei

tir

ec

ar,

e 1

ar

bea

llec

ects

an

th 1

mpl her

TH

cies r, a

#fu]

n w

ent,

ac

ereb

llno

try c

(r) S

t. 25

of his decease, as against his heir) is wrongful, and therefore a deforcement (p). The fame happens, when one of nonfane memory alienes his lands or tenements, and the alienee enters and holds possession, this is also a deforcement (q). Another species of deforcement is, where two persons have the same title to land, and one of them enters and keeps poffeffion against the other: as where the ancestor dies seised of an eftate in fee-simple; which descends to two fisters as copar. ceners, and one of them enters before the other, and will not fuffer her fifter to enter and enjoy her moiety; this is alfor deforcement (r). Deforcement may also be grounded on the non-performance of a covenant real: as if a man, feised of lands, covenants to convey them to another, and neglects or refuses so to do, but continues possession against him; this possetsion, being wrongful, is a deforcement (s). And hence in levying a fine of lands, the person, against whom the fictitious action is brought upon a supposed breach of covenant, is called the deforciant. Thus, laftly, keeping a man by any means out of a freehold office is a deforcement: and, indeed, from all these instances it fully appears, that whatever injury, (withholding the possession of a freehold) is not included under one of the four former heads, is comprized under this of deforcement.

THE several species and degrees of injury by ouser being thus ascertained and defined, the next consideration is theremedy: which is, universally, the restitution or delivery of possession to the right owner; and, in some cases, damages also for the unjust amotion. The methods, whereby these remedies, or either of them, may be obtained, are various.

I. THE first is that extrajudicial and summary one, which we slightly touched in the first chapter of the present book (t), of entry by the legal owner, when another person, who hath moright, hath previously taken possession of lands or tenements. In

⁽p) Finch. L. 264. F. N. B. 192. (q) Finch, ibid. F. N. B. 202. (r) Finch, L. 293, 294. F. N. B. 197. (s) F. N. B. 146. (t) See pag. 5.

1. 10.

n

t

a

le I

f

or

is

ce

he

it,

ny

d,

U-

ed

118

ng

re-

of

lio

ne-

ich

, of

no

In

his

46.

scase the party entitled may make a formal, but peaceable, try thereon, declaring that thereby he takes possession; ich notorious act of ownership is equivalent to a feodal infiture by the lord (v): or he may enter on any part of it in fame country, declaring it to be in the name of the whole): but if it lies in different counties he must make different tries; for the notoriety of fuch entry or claim to the pares freeholders of Westmorland, is not any notoriety to the res or freeholders of Suffex. Also if there be two diffeifors, party diffeifed must make his entry on both; or if one feifor has conveyed the lands with livery to two distinct offees, entry must be made on both (w) : for as their seisin is find, so also must be the act which devests that seisin. If claimant be deterred from entering by menaces or bodily ar, he may make claim, as near to the estate as he can, with elike forms and folemnities: which claim is in force for a ar and a day only (x). And therefore this claim, if it be peated once in the space of every year and day, (which is lled continual claim) has the same effect with, and in all rees amounts to, a legal entry (y). Such an entry gives a an seisin (z), or puts him into immediate possession that th right of entry on the estate, and thereby makes him mplete owner, and capable of conveying it from himself by her descent or purchase.

This remedy by entry takes place in three only of the five cies of ouster, viz. abatement, intrusion, and dissessing (a):

7, as in these the original entry of the wrongdoer was unwill, they may therefore be remedied by the mere entry of m who hath right. But upon a discontinuance or deforcement, the owner of the estate cannot enter, but is driven to a action: for herein the original entry being lawful, and creby an apparent right of possession being gained, the law linot suffer that right to be overthrown by the mere act or try of the claimant.

ON

⁽v) See book II. ch. 14. pag. 209. (u) Litt. §. 417. (w) Co. II. 252. (x) Litt. §. 422. (y) Ibid. §. 419. 423. (z) Co. Litt. (a) Ibid. 237.

be

rt

ut

e

on

ont

los

12

on

Sc

offer

ent

ofe

ies,

rtu

all all the

nd]

er r

n, 1

try c

aceal tute

ate or

(g) S

prin

On the other hand, in case of abatement, intrusion, or di seifin, where entries are generally lawful, this right of com may be tolled, that is, taken away, by descent. Descent which take away entries (b), are when any one, feifed by a means what soever of the inheritance of a corporeal heredia ment, dies, whereby the same descends to his heir: inthe cafe, however feeble the right of the ancestor might be, entry of any other person who claims title to the freehold taken away; and he cannot recover possession against the he by this furmary method, but is driven to his action to gain legal feifin of the estate. And this, first, because the he comes to the estate by act of law, and not by his own ad the law therefore protects his title, and will not fuffer h possession to be devested, till the claimant hath proved about ter right. Secondly, because the heir may not sudden know the true state of his title : and therefore the law, which is ever indulgent to heirs, take away the entry of fuch claim ant as neglected to enter on the ancestor, who was we able to defend his title; and leaves the claimant only the n medy of a formal action against the heir (c). Thirdly, the was admirably adapted to the military spirit of the feel tenures, and tended to make the feudatory bold in war; in his children could not, by any mere entry of another, dispossessed of the lands whereof he died seised. And, latt it is agreable to the dictates of reason and the general print ples of law.

For, in every complete title (d) to lands, there are to things necessary; the possession or seisin, and the right or property therein (e): or, as it is expressed in Fleta, the juril seisinae conjunctio (f). Now if the possession be severed for the property, if A has the jus proprietatis, and B by some we lawful means has gained possession of the lands, this is an interpretation of the lands, the lands of the lands o

⁽b) Litt. §. 385.—413. (c) Co Litt. 237. (d) See book ch. 13. (e) Mirror. c. 2. §. 27. (f) l. 3. c. 15. §. 5.

kI

offession, but does it by different means according to the cirunstances of the case. Thus, as B, who was himself the rong doer, and hath obtained the possession by either fraud or orce, hath only a bare or naked possession, without any shadow f right; A therefore, who hath both the right of property nd the right of possession, may put an end to his title at ace, by the fummary method of entry. But, if B the wrong per dies seised of the lands, then B's heir advances one step rther towards a good title : he hath not only a bare possession, ut also an apparent jus possessionis, or right of possession. For e law prefumes, that the possession, which is transmitted om the ancestor to the heir, is a rightful possession, until the intrary be shewn: and therefore the mere entry of A is not lowed to evict the heir of B; but A is driven to his action law to remove the possession of the heir, though his entry one would have dispossessed the ancestor.

So that in general it appears, that no man can recover offession by mere entry on lands, which another hath by deent. Yet this rule hath fome exceptions (g); wherein ofereasons cease, upon which the general doctrine is ground-; especially if the claimant were under any legal disabiies, during the life of the ancestor, either of infancy, costure, imprisonment, infanity, or being out of the realm : all which cases there is no neglect or laches in the claimant, d therefore no descent shall bar, or take away his entry (h). nd his title, or taking away entries by descent, is still farer narrowed by the statute 32 Hen. VIII. c. 33. which acts, that if any person diffeifes or turns another out of possesn, no descent to the heir of the disseisor shall take away the try of him that has right to the land, unless the diffeisor had aceable possession five years next after the disseisin. But the tute extendeth not to any feoffee or donee of the diffeifor, meateor immediate (i): because such a one by the genuine feodal aftitutions always came into the tenure folemnly and with the HS

(8) See the particular cases mentioned by Littleton, b. 3. ch. 6. principles of which are well explained in Gilbert's law of terms. (h) Co. Litt. 246. (i) Ibid. 256.

C

iti

ea

ler

ea

ne

hal

oui

n f

off

oid

am

he l

teer

nen

vho

nfo

II

of th

ent

re

idva

troy

whic

he p

at p

lord's concurrence, by actual delivery of seisin or open and public investiture. On the other hand, it is enacted by the statute of limitations, 21 Jac. I. c. 16. that no entry shall be made by any man upon lands, unless twenty years after he right shall accrue. And by statute 4 & 5 Ann. c. 16. no entry shall be of force to satisfy the said statute of limitations, or to avoid a fine levied of lands, unless an action be thereupon commenced within one year after, and prosecuted with effect.

UPON an ouster, by the discontinuance of tenant in tall we have faid that no remedy by mere entry is allowed; but that, when tenant in tail alienes the lands entailed, this take away the entry of the iffue in tail, and drives him to his action at law to recover the possession (k). For, as in the former cases the law will not suppose, without proof, that the ancestor of him in possession acquired the estate by wrong; and therefore, after five years peaceable possession, and a descent cast, will not suffer the possession of the heir to be disturbed by mere entry without action; so here, the law will not suppose the discontinuor to have aliened the estate without power fo to do, and therefore leaves the heir in tail to his action a law, and permits not his entry to be lawful. Besides, the alience, who came into possession by a lawful conveyance, which was at least good for the life of the alienor, hath no only a bare possession, but also an apparent right of possession; which is not allowed to be devested by the mere entry of the claimant, but continues in force till a better right be shewn, and recognized by a legal determination. And something also perhaps, in framing this rule of law, may be allowed to the inclination of the courts of justice, to go as far as they could in making estates-tail alienable, by declaring such aliena tions to be voidable only, and not absolutely void.

In case of deforcements also, where the deforciant had one ginally a lawful possession of the land, but now detains it wrong fully, he still continues to have the presumptive prima fact evidence

Ш

and

the

ll be

ntry

10

pon

et.

tail.

but

kes

eti-

mer

an-

and

ent

bed

up-

Wel

1 at

the

nce,

idence of right; that is, possession lawfully gained. Which offession shall not be overturned by the mere entry of another; it only by the demandant's shewing a better right in a course law.

THIS remedy by entry must be pursued, according to statute Ric. II. ft. 1. c. 8. in a peaceable and eafy manner; and not ith force or strong hand. For, if one turns or keeps another at of possession forcibly, this is an injury of both a civil and criminal nature. The civil is remedied by immediate reitution; which puts the antient possessor in statu quo: the iminal injury, or public wrong, by breach of the king's eace, is punished by fine to the king. For by the statute 8 len. VI. c. 9. upon complaint made to any justice of the eace, of a forcible entry, with strong hand, on lands or nements; or a forcible detainer after a peaceable entry; he all try the truth of the complaint by jury, and, upon force : ound, shall restore the possession to the party so put out: and fuch case, or if any alienation be made to defraud the offeffor of his right, (which is declared to be absolutely oid) the offender shall forfeit, for the force found, treble amages to the party grieved, and make fine and ransom to he king. But this does not extend to fuch as endeavour to teep possession manu forti, after three years peaceable enjoytent of either themselves, their ancestors, or those under shom they claim; by a subsequent clause of the same statute, aforced by statute 31 Eliz. c. 11.

II. Thus far of remedies, where the tenant or occupier of the land hath gained only a mere possession, and no apparent shadow of right. Next follow another class, which are in use where the title of the tenant or occupier is advanced one step nearer to perfection; so that he hath in him not only a bare possession, which may be detroyed by entry, but also an apparent right of possession, which cannot be removed but by course of law: in the process of which must be shewn, that though he hath at present possession, and therefore hath the presumptive right

on

ho

nd

S

IN

thi

air

arg

gre

nde

cur

vay

fect

ong

th.

entr

the

om

er (

nisit

ree

ry, i

or un

on b imisi

orig

fuch

sor

degr and

204

right, yet there is a right of possession, superior to his, real ing in him who brings the action.

THESE remedies are either by a writ of entry, or an affin which are actions merely poffeffory; ferving only to rea that possession, whereof the demandant (that is, he who in for the land) or his ancestors, have been unjustly deprived the tenant or possessor of his freehold, or those under who he claims. They meddle not with the right of property; on restoring the demandant to that state or situation, in which he was (or by law ought to have been) before the dispossession committed. But this without any prejudice to the right ownership; for, if the dispossessor has any legal claim, may afterwards exert it, notwithstanding a recovery h against him in these possessory actions. Only the law w not fuffer him to be his own judge, and either take or main tain possession of the lands, until he hath recovered them legal means (1): rather prefuming the right to have account panied the antient feifin, than to refide in one who had fuch evidence in his favour.

1. The first of these possessiony remedies is by writ of a try; which is that which disproves the title of the tenant of possession, by shewing the unlawful means by which he enters or continues possession (m). The writ is directed to the seriff, requiring him to "command the tenant of the land the "he render (in Latin, praecipe quod reddat) to the demandar the premises in question, which he claims to be his right and inheritance; and into which, as he saith, the series in tenant hath not entry but by a disseisin, intrusion, or the like, made to the said demandant, within the time limits by law: or that upon resusal he do appear in court on series a day, to shew wherefore he hath not done it (n). This is the original process, the praecipe, upon which a the rest of the suit is grounded; and from hence it appears that what is required of the tenant is in the alternative either the said that what is required of the tenant is in the alternative either the said that what is required of the tenant is in the alternative either the said that the said that what is required of the tenant is in the alternative either the said that the said tha

⁽¹⁾ Mirr. c. 4. §. 24. (m) Finch. L. 261. (n) See Vol. I append. No. V. §. 1.

at o

tere The

tha

dan

righ

Gai

th

nite

fud

n).

h a

ear

ithe

ol. 1

ther to deliver seisin of the lands, or to shew cause why he ill not. Which cause may be either a denial of the fact, of wing entered by such means as are suggested, or a justification of his entry by reason of title in himself, or in those under hom he makes claim: and hereupon the possession of the nd is awarded to him who produces the clearest right to possible.

In our antient books we find frequent mention of the degrees, thin which writs of entry are brought. If they be brought ainst the party himself who did the wrong, then they only arge the tenant himself with the injury; " non babuit ingressum nisi per intrusionem quam ipse fecit." But if the inder, diffeissor, or the like, has made any alienation of the d to a third person, or it has descended to his heir, that cumstance must be alleged in the writ, for the action must vays be brought against the tenant of the land; and the fect of his possessfory title, whether arising from his own ong or that of those under whom he claims, must be set th. One fuch alienation or descent makes the first (o) dee, which is called the per, because then the form of a writ entry is this; that the tenant had no right of entry, but the original wrongdoer, who alienated the lands, or from om it descended, to him: " non babuit ingressum, nist er Guilielmum, qui se in illud intrusit, et illud tenenti diissult (p)." A second alienation or descent makes another ree called the per and cui; because the form of a writ of ry, in that case, is, that the tenant had no title to enter, but runder a prior alience, to whom the intruder demised it; on babuit ingressum nifi per Ricardum, cui Guilielmus illud mist, qui se in illud intrust (a)." These degrees thus state original wrong, and the title of the tenant who claims unfuch wrong. If more than two degrees, that is, two alienas ordescents were past, there lay no writ of entry at the com-

Finch. L. 262. Booth indeed (of real actions 172) makes the degree to confift in the original wrong done, the second in the and the third in the per and cui. But the difference is immal.

(p) Booth. 181.

(q) Finch. L. 263. F. N. B.

h

e

to

en

ng

to

dif

iire

g

hly

viun

rts,1

) F.

14.

fol.

and

edy e a aet h lie

rftan

; or

or di

nel c

he real at for d. 205

tat. C

he re

qui p flion is m of a

e interior

mon law. For, as it was provided, for the quietness of mer inheritances that no one, even though he had the true rights possession, should enter upon him who had the apparent in by descent or otherwise, but he was driven to his zerit of out to gain possession; so, after more than two descents, or to conveyances were paffed, the demandant, even though had the right both of possession and property, was not allow this possession; but was driven to his zurit of right, long and final remedy, to punish his neglect in not foon putting in his claim, while the degrees subfifted, and forth ending of fuits, and quieting of all controversies (r). B by the statute of Marlbridge, 52 Hen. III. c. 30. it was pro vided, that when the number of alienations or descents ceeded the usual degrees, a new writ should be allowed with out any mention of degrees at all. And accordingly and writ has been framed, called a writ of entry in the m which only alleges the entry of the wrong doer, without ded cing all the intermediate title from him to the tenant: fain it in this manner; that the tenant had no legal entry unle after, or subsequent to, the ouster or injury done by them ginal dispossessor; " non habuit ingressum nisi post intruson a quam Guilielmus in illud fecit;" and rightly concluding the if the original title was wrongful, all claims derived for thence must participate of the same wrong. Upon the lat of these writs it is (the writ of entry fur diffeisin in the so usually grounded; which, we may remember, were oblet in the preceding volume (s) to be fictitious actions, brown against the tenant of the freehold (usually called the tenant the praecipe, or writ of entry) in which by collusion the mandant recovers the land.

This remedial instrument, of writ of entry, is applicable all the cases of ouster before-mentioned, except that of disconnuance by tenant in tail, and some peculiar species of delor ments. Such is that of deforcement of dower, by notalized any dower to the widow within the time limited by laws

one the from the from

ie c

con

ch she has her remedy by a writ of dower, unde nibil babet But if she be deforced of a part only of her dower, she not then fay that nibil habet : and therefore she may have urse to another action, by writ of right of dower: which more general remedy, extending either to part or the ole; and is (with regard to her claim) of the same nature he grand writ of right, whereof we shall presently speak, ith regard to claims in fee-simple (t). On the other hand, he heir (being within age) or his guardian, assign her e than she ought to have, they may be remedied by a of admeasurement of dower (u). But in general the writ entry is the univerfal remedy to recover possession, when ngfully withheld from the owner. It were therefore endto recount all the feveral divisions of writs of entry, which different circumstances of the respective demandants may ine, and which are furnished by the laws of England (v): g plainly and clearly chalked out in the most antient and ly venerable collection of legal forms, the registrum omnium vium, or register of such writs as are suable out of the king's ts,upon which Fitzher bert's natura brevium is a comment;

) F. N. B. 147. (t) Ibid. 16. (u) F. N. B. 148. Finch. 14. Stat. Westm. 2. 13 Edw. I. c. 7. (v) See Britton. c. fol. 264. The most usual were, 1. The writs of entry fui difand of intrusion: (F. N. B. 191. 203.) which are brought to ety either of those species of ouster. 2. The writs of dum fuit h lie for a person of full age, or one who hath recovered his thanding, after having (when under age or infane) aliened his or for the heirs of such alienor. 3. The writs of cui in wita mi ante divortium (Ibid. 193. 204.) for a woman, when a wior divorced, whose husband during the coverture (cui in vita vel cui ante divortium, ipfa contradicere non potuit) hath aliher estate. 4. The writ ad communem legem (Ibid. 207.) he reversioner, after the alienation and death of the particular, nt for life. 5. The writs in casu proviso and in consimili casu 1.205. 206.) which lay not ad communem legem, but are given lat. Gioc. 6 Edw. I c. 7. and Westm. 2. 13 Edw. I. c. 24. he reversioner after the alienation, but during the life of the at in dower, or other tenant for life. 6. The writ ad termiqui praete iit (Ibid. 201.) for the reversioner, when the thon is withheld by the leffee or a ftranger, after the determia of a leafe for years. 7. The writ causa matrimonii praelocuti 105.) for a woman who giveth land to a man in fee or for life, e intent that he may marry her, and he doth not. And the in case of other deforcements.

ju

2

ch

d

th

e v

on

re,

ve

wh

tha

fife

HI

ies (

diffe

land

hew

ne d

is t

land

e feif dan

F

Co. 1

and in which every man who is injured will be fure to fine method of relief, exactly adapted to his own case, described in the compass of a few lines, and yet without the omission any material circumstance. So that the wise and equita provision of the statute Westm. 2. 13 Edw. I. c. 24. for fining new writs when wanted (w), is almost rendered usels the very great perfections of the antient forms. And into I know not whether it is a greater credit to our laws, to be such a provision contained in them, or not to have occase or at least very rarely, to use it.

In the times of our Saxon ancestors, the right of possessing feems only to have been recoverable by writ of entry so which was then usually brought in the county court. And is to be observed, that the proceedings in these actions we not then so tedious, when the courts were held, and processifully devery three weeks, as after the conquest, when causes were drawn into the king's courts, and processiful from term to term; which was found exceeding dilate being at least four times as slow as the other. And here new remedy was invented in many cases, to do justice to people, and to determine the possession, in the proper courses, and yet by the king's judges. This was the reme by assiste, of which we are next to speak.

2. The writ of affife is said to have been invented Glanvil, chief justice to Henry the second (y); and so, it seems to owe its introduction to the parliam held at Northampton, in the twenty-second year of a prince's reign: when justices in eyre were appointed to round the kingdom in order to take these affises; and affises themselves (particularly those of mort d'ancestre novel disseis) were clearly pointed out and described (2).

⁽w) See pag. 51. (x) Gilb. Ten. 42. (y) Mirror. c. 25. (z) § 9. Si dominus feodi negat haeredibus defundif nam ejusdem feodi, justituarii domini regis faciant inde stit cognitionem per xii legales nomines, qualem saisinam defundu habuit, die qua suit vivus et mortuus; et sicht recognitum sita haeredibus ejus restituant. § 10. Justitiarii domini regis su sieri recognitionem de dissaisins sactis super assisam, a iemport dominus rex venit in Angliam proxime post pacem sactum intestin sur et regem silium suum. (Spelm. Cod. 330.)

ind W

en iffu

to

ted

nd, am

nd

1

). a v

nit of entry is a real action, which difproves the title of the ant, by shewing the unlawful commencement of his poson; fo an affise is a real action, which proves the title of demandant, merely by shewing his, or his ancestor's effion (a): and these two remedies are in all other respects otally alike, that a judgment or recovery in one is a bar inft the other: fo that when a man's possession is once blished by either of these possessory actions, it can never disturbed by the same antagonist in any other of them. word affife, is derived by fir Edward Coke (b) from Latin affideo, to fit together; and it fignifies, originally, jury who try the cause, and sit together for that purpose. a figure it is now made to fignify the court or jurisdiction, chfummons this jury together by a commission of assise, dassifas capiendas; and hence the judicial assemblies held the king's commission in every county, as well to take e writs of affise, as to try causes at nisi prius, are termed ommon speech the assistes. By another somewhat similar re, the name of affife is also applied to this action, for wering possession of lands: for the reason, saith Littleton, why fuch writs at the beginning were called affifes, was, that in these writs the theriff is ordered to summon a jury, fife; which is not expressed in any other original writ (d).

His remedy, by writ of affise, is only applicable to two issof injury by ouster, viz. abatement, and a recent or notificisin. If the abatement happened upon the death of the andant's father or mother, brother or sister, uncle or aunt, hew or niece, the remedy is by an affise of mort d'ancestor. He death of one's ancestor: and the general purport of this is to direct the sheriff to summon a jury or affise, to view land in question, and to recognize whether such ancestor theised thereof on the day of his death, and whether the dedant be the next heir (e). And, in a short time after, the judges.

Finch. L. 284. (b) 1 Inft. 153. (c) §. 234. (c) Litt, 159. (e) F. N. B. 195. Finch. L. 296.

ce.

it

ds

ar.

d, i

on

ha

N a

nat

th

tdi

ites

d,

hma

teep

ife;

llas

to f

tion

ial,

I fei

the the

ifin,

HE pr

writ (

eding

lama

te of

ffessi

See

judges usually come down by the king's commission to taketh recognition of affife; when, if these points are found in the affirmative, the law immediately transfers the possession for the tenant to the demandant. If the abatement happened the death of one's grandfather or grandmother, then an affi of mort d' ancestor no longer lies, but a writ of ayle, or avo; if on the death of the great grandfather, or great grand mother, then a writ of befayle, or de proavo; but if it mount one degree higher, to the trefayle or grandfather's grandfa ther, or if the abatement happened upon the death of an collateral relation, other than those before-mentioned t writ is called a writ of cofinage, or de confanguineo (f). An the same points shall be enquired of in all these actions and firel, as in an affise of mort d'ancestor; they being of the very fame nature (g): though they differ in this point form, that these ancestrel writs (like all other writs of praction expressly affert the demandants title, (viz. the seisin of the ancestor at his death, and his own right of inheritance) the affife afferts nothing directly, but only prays an enquiry wh ther those points be so (h). There is also another ancestr writ, denominated a nuper obiit, to establish an equal divi on of the land in question, where on the death of an ance tor, who has feveral heirs, one enters and holds the other out of possession (i). But a man is not allowed to have any these possessions for an abatement consequent on t death of any collateral relation, beyond the fourth degree (k though in the lineal afcent he may proceed ad infinitum (For the law will not pay any regard to the possession of ac lateral relation, fo very distant as hardly to be any at all.

It was always held to be law (m), that where lands wered visable in a man's last will by the custom of the place, there assise of mort d'ancestor did not lie. For, where lands were devisable, the right of possession could never be determined a pu

⁽f) Finch. L. 266, 267. (g) Stat. Westm. 2. 13 Ed I. c. 20. (h) 2 Inst. 399. (i) F. N. B. 197. Fin L. 293. (k) Hale on F. N. B. 221. (l) Fitch. A tit. cosinage. 15. (m) Bracton. I. 4. de assist foris. c. 13. §. 3. F. N. B. 196.

refs, which enquired only of these two points, the seising ancestor, and the heirship of the demandant. And it might be reasonable to conclude, that when the stanswills, 32 Hen. VIII. c. 1. made all socage lands dee, an assise of mort d'ancestor no longer could be brought des held in socage (n); and that now, since the statute at II. c. 24. which converts all tenures, a few only existe of mort d'ancestor can be brought of any lands in the som; but, in case of abatements, recourse must be prohad to the more antient writs of entry.

vassife of novel (or recent) disseifin is an action of the nature with the assise of mort d'ancestor before mentionthat herein the demandant's possession must be shewn. tdiffers confiderably in other points: particularly in that ites a complaint by the demandant of the diffeifin comd, in terms of direct averment; whereupon the sheriff amanded to reseise the land and all the chattels thereon, tep the same in his custody till the arrival of the justices ile; (which fince the introduction of giving damages, las the possession, is now omitted) (o) and in the mean to fummon a jury to view the premises, and make retion of the assise before the justices (p). And if, upon ial, the demandant can prove, first, a title; next, his leisin in consequence thereof; and, lastly, his disseithe present tenant; he shall have judgment to recover in, and damages for the injury fustained.

Edw. I. c. 24. festinum remedium, in comparison of that wit of entry; it not admitting of many dilatory pleas and edings, to which other real actions are subject (q). Costs lamages were annexed to these possessory actions by the to Glocester, 6 Edw. I. c. 1. before which the tenant session was allowed to retain the intermediate profits of

See 1 Leon. 267. (a) Booth, 211. (b) F. N. (c) Booth, 262.

10

L

hir

.

etl

e y

ma

pa

al

t-e

for

ive

ion

rfo

n t

tors

nde

ted

lain

b

fir

roc

yre

yea ve

at t

his

hi

befo

HA

ne

32 the

ead'

inte

her ats,

the land, to enable him to perform the feodal burthens inch thereunto. And, to prevent frequent and vexatious different it is enacted by the statute of Morton, 20 Hen. III. that if a person disseised recover seisin of the land agin affife of novel diffeifin, and be again diffeifed of the fame nements by the same diffeifor, he shall have a writ of n. feifin; and, if he recover therein, the re-diffeifor fall imprisoned; and, by the statute of Marlbridge, 52 Hen. c. 8. shall also pay a fine to the king: to which the h Westm. 2. 13 Edw. I. c. 26. hath superadded double to ges to the party aggrieved. In like manner, by the statute of Merton, when any lands or tenements are i vered by affife of mort d'ancestor, or other jury, or anyi ment of the court, if the party be afterwards diffeiled by fame person against whom judgment was obtained, he have a writ of post-disseifin against him; which subjects post-disseifor to the same penalties as a re-disseifor. The fon of all which, as given by fir Edward Coke (r), is be fuch proceeding is a contempt of the king's courts, an despite of the law; or, as Bracton more fully expresses talis qui ita convictus fuerit, dupliciter delinquit contra " gem: quia facit disseisinam et roberiam contra pacens et etiam aufu temerario irrita facit ea, quae in curia ec regis rite actua funt: et propter duplex delictum marit

In all these possessions there is a time of limit settled, beyond which no man shall avail himself of the session of himself or his ancestors, or take advantaged wrongful possession of his adversary. For if he be neglifor a long and unreasonable time the law refuses aftern to lend him any assistance, to recover the possession may both to punish his neglect, (nam leges vigilantibus, non the entibus, subveniunt) and also because it is presumed that supposed wrongdoer has in such a length of time procused it it, otherwise he would sooner have been such time of limitation by the statute of Merton, 20 Hen. Ill 8. and Westm. 1. 3 Edw. I. c. 39. was successively described the successive successively described the successive succes

" nere debet poenam duplicatam."

10

ito

mita

the

e of

egly

erw

that

. III

ly d

particular aeras, viz. from the return of king John Ireland, and from the coronation, &c. of king Henry ird. But this date of limitation continued fo long unalthat it became indeed no limitation at all, it being three hundred years from Henry the third's coronation eyear 1540, when the present statute of limitations (t) made. This, instead of limiting actions from the date particular event, as before, which in process of years absurd, took another and more direct course, which tendure for ever; by limiting a certain period, as fifty for lands, and the like period (u) for customary or preive rents, suits, and services (for there is no time of liion upon rent, referved by deed) (w), and enacting that fon should bring any possessory action, to recover posn thereof merely upon the feifin, or dispossession, of his tors, beyond fuch certain period. And all writs, ded upon the possession or the demandant himself, are ed to be fued out within thirty years after the diffeifin lained of; for if it be an older date, it can with no probe called a fresh, recent, or novel disseisin: which fir Edward Coke informs us was originally given to proceeding, because the diffeisin must have been since the yre or circuit of the justices, which happened once in years, otherwife the action was gone (x). And we may ve (y), that the limitation, prescribed by Henry the seat the first institution of the assise of novel disseifin, was his own return into England after the peace made behim and the young king his fon , which was but the before.

HAT has been here observed may throw some light on the me of remitter, which we spoke of in the second chapter of

(y) See pag. 184.

³² Hen. VIII. c. 2. (u) See Berthelet's original edithe statute, A. D. 1540: and Cay's, Pickering's, and the ead's editions, examined with the record. Rastell's, and intermediate editions, which fir Edward Coke (2 Inst. 95.) her subsequent writers have followed, make only forty years ats, &c. (w) 8 Rep. 65. (x) 1 Inst. 253. Booth.

ne th

T

an d t

d t

ich

juo

3. th j

mer

wev er aş

4

fro

tute Nessi

ng,

nt o

faid

i. A

fion

ned i

, (Je

right

re (b

ich i

that

of this book (z); and which, we may remember, was, one who hath a right to lands, but is out of poffession, afterwards the freehold cast upon him by some subseque fective title, and enters by virtue of that title. In this the law remits him to his antient and more certain right by an equitable fiction supposes him to have gained poli in consequence, and by virtue, thereof: and this, becau cannot possibly obtain judgment at law to be restored prior right, fince he is himself the tenant of the land therefore hath nobody against whom to bring his a This determination of the law might feem superfluous hafty observer, who perhaps would imagine, that fine tenant hath now both the right and also the possession, tle fignifies by what means fuch possession shall be faid But the wisdom of our antient law determine thing in vain. As the tenant's possession was gained by fective title, it was liable to be overturned by shewing defect in a writ of entry; and then he must have been to his writ of right, to recover his just inheritance: would have been doubly hard, because, during the ti was himself tenant, he could not establish his prior titled possessory action. The law therefore remits him to his title, or puts him in the same condition as if he had rea the land by writ of entry. Without the remitter her have had jus, et seisinum, separate; a good right, but possession: now, by the remitter, he hath the most p of all titles, juris et seisinae conjunctionem.

III. By these possessory remedies the right of sion may be restored to him, that is unjustly deprived to But the right of possessory (though it carries with ita strong sumption) is not always conclusive evidence of the right of perty, which may still subsist in another man. For, as on may have the possessor, and another the right of possessory, is recovered by these possessory actions; so one man may

right of possession, and cannot therefore be evicted by any selfory action; and another may have the right of property, ich cannot be otherwise asserted than by the great and final nedy of a writ of right, or such correspondent writs as are the nature of a writ of right.

elistes about the tomile first al sacrofolis THIS happens principally in four cases: 1. Upon discontiance by the alienation of tenant in tail: whereby he, who d the right of possession, hath transferred it to the alienee: therefore his issue, or those in remainder or reversion, Il not be allowed to recover by virtue of that possession, ich the tenant hath so voluntarily transferred. 2. In case judgment given against either party by his own default: 3. Upon trial of the merits, in any possessory action: for h judgment, if obtained by him who hath not the true nership, is held to be a species of deforcement; which wever binds the right of possession, and suffers it not to be ragain disputed, unless the right of property be also prov-4. In case the demandant, who claims the right, is barfrom these possessory actions by length of time and the tute of limitations before-mentioned: for an undisturbed fession, for fifty years, ought not to be devested by any ng, but a very clear proof of the absolute right of propri-. In these four cases the law applies the remedial instrunt of either the writ of right itself, or such other writs as faid to be of the fame nature.

the estate tail is discontinued, and the remainder or refion is by failure of the particular estate displaced, and med into a mere right, the remedy is by action of formeth, (secundum formam doni) which is in the nature of a write right (a), and is the highest action that tenant in tail can we (b). For he cannot have an absolute write of right, sich is confined only to such as claim in see-simple; and that reason this write of formedon was granted him by the

⁽a) Finch. L. 267.

⁽b) Co. Litt. 316.

co

0

ou

ft

s, aul

ally

hat

ily

ery

d to

ce i

poff

defe

lefar

e-ta

, 4.

rec

the

hav

eft v

le, a

concu

ee-fin

gas

t hatl

OL. I

F. N

the statute de donis or Westm. 2. 13 Edw. I. c. 1. while therefore emphatically called his writ of right (c). This is diffinguished into three species; a formedon in the defin er, in the remainder, and in the reverter. A writ offin don in the descender lieth, where a gift in tail is made, the tenant in tail alienes the lands entailed, or is differed them, and dies : in this case the heir in tail shall have writ of formedon in the descender, to recover these lands given in tail, against him who is then the actual tenant of freehold (d). In which action the demandant is boun state the manner and form of the gift in tail, and to himself heir fecundum formam doni. A formedon in the mainder lieth, where a man giveth lands to another for in in tail, with remainder to a third person in tail or in and he who hath the particular estate dieth, without ister heritable, and a stranger intrudes upon him in remain and keeps him out of poffession (e). In this case the rem der-man shall have his writ of formedon in the remain wherein the whole form of the gift is stated, and the pening of the event upon which the remainder depen This writ is not given in express words by the statute de nis, but is founded upon the equity of the statute, and this maxim in law, that if any one hath a right to the he ought also to have an action to recover it. A formula the reverter lieth, where there is a gift in tail, and afterw by the death of the donee or his heirs without iffue of his the reversion falls in upon the donor his heirs, or assigns fuch case the reversioner shall have this writ to recover the wherein he shall suggest the gift, his own title to the reve minutely derived from the donor, and the failure of iffer on which his reversion takes place (f). This lay at com law, before the statute de donis, if the donee aliened by he had performed the condition of the gift, by having and afterwards died without any (g). The time of limital a formedon by statute 21 Jac. I. c. 16. is twenty years;

⁽c) F. N. B. 255. (d) Ibid. 211, 212. (e) 217. (f) Ibid. 219. 8 Rep. 88. (g) Finch. L. 16

ns la ver

gi

atil

(e)

ich space of time after his title accrues, the demandant st bring his action, or else is for ever barred.

. In the fecond case; if the owners of a particular estate. for life, in dower, by the curtefy, or in fee-tail, are barof the right of possession by a recovery had against them. ough their default or non-appearance in a possessory actithey were absolutely without any remedy at the comnlaw; as a writ of right does not lie for any but fuch as m to be tenants of the fee-simple. Therefore the statute fm. 2. 13 Edw. I. c. 4. gives a new writ for fuch pers, after their lands have been fo recovered against them by ault, called a quod ei deforceat; which, though not fly a writ of right, fo far partakes of the nature of one, hatit will restore the right to him, who has been thus unily deforced by his own default (h). But in case the reery were not had by his own default, but upon defence in inferior possession, this still remains final with reto these particular estates, as at the common law: and ce it is, that a common recovery (on a writ of entry in post) had, not by default of the tenant himself, but (after defence made and voucher of a third person to warranty) lefault of fuch vouchee, is now the usual bar to cut off an e-tail (i).

recovery upon the merits in a possession, or, lastly, the statute of limitations, a claimant in fee-simple have a mere writ of right; which is in its nature the sest writ in the law (k), and lieth only of an estate in fee-sle, and not for him who hath a less estate. This writ concurrently with all other real actions, in which an estate estimple may be recovered; and it also lies after them, gas it were an appeal to the mere right, when judgithath been had as to the possession in an inferior possion. III.

F. N. B. 155. (i) See book II. ch. 21. (k) F N. B. 1.

bu

rd

ce

ipe orn ord

ein

ing

litt

hic

ther

nd t

ie w

ato t

nto t

t the

IN

ome f

(9)

(w) litcher & t garde

0. I.

nd, N

fessory action (1). But though a writ of right may be brough where the demandant is entitled to the possession, yet it as is advisable to be brought in such cases; as a more expectious and easy remedy is had, without meddling with property, by proving the demandant's own, or his another possession, and their illegal ouster, in one of the possessions. But, in case the right of possession be lost by a citions. But, in case the right of possession be lost by a continue, or by judgment against the true owner in one these inferior suits, there is no other choice: this is the only remedy that can be had: and it is of so forcible a national that it overcomes all obstacles, and clears all objections may have arisen to cloud and obscure the title. And, a issue once joined in a writ of right, the judgment is absoluted in the possession of the possession of

THE pure, proper, or mere writ of right lies only, have faid, to recover lands in fee-simple, unjustly withfrom the true proprietor. But there are also some others which are faid to be in the nature of a writ of right, be their process and proceedings do mostly (though not inti agree with the writ of right: but in some of them the feeple is not demanded; and in others not land, but some in poreal hereditament. Some of these have been already in tioned, as the writ of right of dower, of formedon, &c. the others will hereafter be taken notice of, under their per divisions. Nor is the mere writ of right alone, or ways, applicable to every case of a claim of lands in feeple : for if the lord's tenant in fee-simple dies without whereby an escheat accrues, the lords shall have a wi escheat (n), which is in the nature of a writ of right (0). if one of two or more coparceners deforces the other usfurping the fole possession, the party aggrieved shall ha writ of right de rationabili parte (p) : which may be grou

⁽¹⁾ F. N. B. 1. 5. (m) *Ibid.* 6. Co. Litt. 158. (n) B. 143. (o) Booth. 135. (p) F. N. B. 9.

6.

or I

er,

the seisin of the ancestor at any time during his life; hereas in a nuper obiit (which is a possessory remedy) (q) he will be seised at the time of his death. But, waving these ad other minute distinctions, let us now return to the general writ of right.

THIS writ ought to be first brought in the court-baron (r) the lord, of whom the lands are holden; and then it is pen or patent: but if he holds no court, or hath waived his ght remissit curiam suam, it may be brought in the king's burts by writ of praecipe originally (s); and then it is a writ right close (t), being directed to the sheriff, and not the rd (u). Also, when one of the king's immediate tenant's capite is deforced, his writ of right is called a writ of praehe in capite (the improper use of which, as well as of the ormer praecipe, quia dominus remisit curiam, so as to oust the ord of his jurisdiction, is restrained by magna carta) (w) and, eing directed to the sheriff and originally returnable in the ing's courts, is also a writ of right close (x). There is likewise little writ of right close, secundum consuetudinem manerii, hich lies for the king's tenants in antient demesne (y), and thers of a fimilar nature (z), to try the right of their lands nd tenements in the court of the lord exclusively (a). But le writ of right patent itself may also at any time be removed to the county court, by writ of tolt (b), and from thence to the king's courts, by writ of pone (c) or recordari facias, the suggestion of either party that there is a delay or deest of justice (d).

In the progress of this action (e), the demandant must allege ome seisin of the lands and tenements in himself, or else in some I 2 person

⁽q) See pag. 186, (r) Append. No. I. §. 1. (s) F. N. B. inch. L. 313; (t) Booth. 91. ii (u) Append. No. 1. §. 4. (w) c. 24. (x) F. N. B. 5. (y) See book II, ch. 6. (2) itchen. tit. copyhold. (a) Bracton. l. 1. c. 11. l. 4 tr. 1. c. 6. tr. 3. c. 13. §. 9. Old Tenur. t. tenir en socage. Old N. B. garde. & t. briefe de recto claus. F. N. B. 11. (b) Append. O. I. §. 2. (c) Ibid. §. 3. (d) F. N. B. 3. 4. (e) Aptend. No. I. §. 5.

person under whom he claims, and then derive the right for the person so seised to himself; to which the tenant may; fwer by denying the demandant's right, and averring that has more right to hold the lands than the demandant has demand them; which puts the demandant upon the proof his title : in which if he fails, or if the tenant can flew at ter, the demandant and his heirs are perpetually barrel their claim; but if he can make it appear that his right fuperior to the tenant's, he shall recover the lands against tenant and his heirs for ever. But even this writ of in however superior to any other, cannot be sued out at any stance of time. For by the antient law no seisin could be leged by the demandant, but from the time of Henry first (f) by the statute of Merton, 20 Hen. III. c. 8. fm the time of Henry the fecond; by the statute of Welm. 3 Edw. I. c. 39. from the time of Richard the first; and no by flatute 32 Hen. VIII. c. 2. seisin in a writ of right h be within fixty years. So that the possession of lands in fa simple uninterruptedly, for three score years, is at prefet fufficient title against all the world; and cannot be impeated by any dormant claim whatfoever.

ouster or dispossession of the freehold, with the remedies appearable to each. In considering which I have been unavoidabled to touch upon much obsolete and abstruse learning, as the intermixed with, and alone can explain the reason of, the parts of the law which are now more generally in use. For without contemplating the whole fabric together, it is impossible to form any clear idea of the meaning and connection those disjointed parts, which still forms a considerable brane of the modern law; such as the doctrine of entries and remitter, the levying of fines, and the suffering of common return ter, the levying of fines, and the suffering of common returns. Neither indeed is any considerable part of the which I have selected in this chapter from among the versable monuments of our ancestors, so absolutely antiquals

from y au at i be ed i

to be out of force, though they are certainly out of use:

the being, it must be owned, but a very sew instances for
the than a century past of prosecuting any real action for
the by writ of entry, assign, formedon, writ of right, or
therwise. The forms are indeed preserved in the practice
common recoveries: but they are forms, and nothing else;
which the very clerks that pass them are seldom capable
assign the reason. But the title of lands is now usually tried
on actions of ejectment, or trespass.

1 3

CHAPTER

stand of finish, the gold her are describly out of sale

and modified their given protocological to the complete to set a

and present well give mad also be the s

(pe

un

th

a

II r y

ma

ma oer,

rit

e v

erfo

hat

cov

es f

I.

eEtr

fye

ian,

all t

d to

ect

ack

CHAPTER THE ELEVENTH.

English to Hamiltonia

OF DISPOSSESSION, OR OUSTER, OF CHATTELS REAL.

AVING in the preceding chapter confidered with some attention the several species of injury by dispossession or ouster of the freehold, together with the regular and well-connected scheme of remedies by actions real, which are given to the subject by the common law, either to recove the possession only, or else to recover at once the possession and also to establish the right of property; the method which I there marked out leads me next to consider injuries by ousser, or dispossession, of chattels real; that is to say, by amoving the possession of the tenant either from an estate by statute-merchant, statute-staple, or elegit; or from an estate for years.

I. OUSTER, or amotion of possession, from estates held by either statute or elegit, is only liable to happen by a species of dissession, or turning out of the legal proprietor, before his estate is determined by raising the sum for which it is given him in pledge. And for such ouster, though the estate be merely a chattel interest, the owner shall have the same remedy as for an injury to a freehold; viz. by assise of novel dissession (a). But this depends upon the several statutes, which create these respective

III

spective interests (b), and which expressly provide and alw this remedy in case of dispossession. Upon which acunt it is that fir Edward Coke observes (c), that these tents are said to hold their estates ut liberum tenementum, untheir debts be paid: because by the statutes they shall have
affise, as tenant of the freehold shall have; and in that reest they have the similitude of a freehold (d).

II. As for ouster, or amotion of possession, from an estate ryears, this happens only by a like kind of dissession, ejection, or turning out, of the tenant from the occupation of the adduring the continuance of his term. For this injury the whas provided him with two remedies, according to the cirmstances and situation of the wrongdoer: the writ of ejectione mae; which lies against any one, the lessor, reversioner, mainder-man, or any stranger, who is himself the wrongter, and has committed the injury complained of: and the mit of quare ejecit infra terminum; which lies not against the wrongdoer or ejector himself, but his feosses or other roon claiming under him. These are mixed actions, somewhat between real and personal; for therein are two things covered, as well restitution of the term of years, as damass for the ouster or wrong.

1. A WRIT then of ejectione firmae, or action of trespass in edment, lieth, where lands or tenements are let for a term spears; and afterwards the lessor, reversioner, remainderan, or any stranger, doth eject or oust the lessee or his em (e). In this case he shall have this writ of ejectione, to all the defendant to answer for entering on the lands so demiste to the plaintist for a term that is not yet expired, and ecting him (f). And by this writ the plaintist shall recove ack his term, or the remainder of it, with damages.

SINCE

order at fill for a the part the below, be the document

deflet in grantse de resurgios, briefe de comment marie es comment mante estantes estants. Esta abre estant estante

⁽b) Stat. Westm. 2. 13 Edw. I. c. 18. Stat. de mercatoribus, 2. dw. III. c. 9. (c) 1 Inst. 43. (d) See book II. ch. 10. (e) F. N. B. 220. (f) See appendix, No. II. §. 1.

ma dgr on ere

we en i

le 1

Ti

eff

in

ars

11

e f

er,

ker

fec

The

te

th

m

1,

ol

try

to

no

11.

become the common method of trying the title to lands or mements. It may not therefore be improper to deline with some degree of minuteness, its history, the manner its process, and the principles whereon it is grounded.

WE have before feen (g), that the writ of covenant, f breach of the contract contained in the lease for years, w antiently the only specific remedy for recovering against leffor a term from which he had ejected his leffee, togeth with damages for the ouster. But if the lessee was ejected a stranger, claiming under a title superior (h) to that of leffor, or by a grantee of the reversion, (who might at a time by a common recovery have destroyed the term) though the leffee might still maintain an action of coverage against the lessor, for non-performance of his contract leafe, yet he could not by any means recover the term itel If the oufter was committed by a mere stranger, withou any title to the land, the leffor might indeed by a real after recover possession of the freehold, but the lessee had a other remedy against the ejector but in damages, but a wi of ejectione firmae, for the trespass committed in ejection him from his farm (k). But afterwards, when the count of equity began to oblige the ejector to make a specific refits tion of the land to the party immediately injured, the courts of law also adopted the same method of doing com plete justice; and, in the prosecution of a writ of ejectment introduced a species of remedy not warranted by the on ginal writ nor prayed by the declaration (which go only for damage

⁽g) See pag. 150. (h) F. N. B. 145. (i) See book ll ch. 9. (k) P. 6. Ric. II. Ejectione firmae ne'st que un actin le trespass en sou nature, et le plaintiss ne recovera son terme que la venir, nient plus que en trespass home recovera damages pur inspass nient fait, mes a feser; mes il convient a suer par actin le covenant al comen law a recoverer son terme: quod tota curia cosses. Et per Belknap, la comen ley est, lou home est ouste de la terme par estranger, il avera ejectione sirmae versus cesty que la ousse; et sil soit ouste par son lessor, briese de covenant; et spat lesse ou grantee de reversion, briese de covenant versus son lesse, et countera especial count, &c. (Fitz, abr. t. eject. sirm. 2.)

urt

om

ent, on-

age

k IL

on de trefon de

con-

mages merely, and are filent as to any restitution) viz. a dyment to recover the term, and a writ of possession thereon(1). This method seems to have been settled as early as creign of Edward IV (m): though it hath been said (n) to we first began under Henry VII. because it probably was an first applied to its present principal use, that of trying the le to the land.

THE better to apprehend the contrivance, whereby this end effected, we must recollect that the remedy by ejectment in its original an action brought by one who hath a leafe for and, to repair the injury done him by dispossession. In ortherefore to convert it into a method of trying titles to freehold, it is first necessary that the claimant do take lession of the lands, to empower him to constitute a lesse years, that may be capable of receiving this injury of difdesion. For it would be an offence, called in our law mainance, (of which in the next book) to convey a title to anoth, when the granter is not in possession of the land: and dedit was doubted at first, whether this occasional possession. ken merely for the purpole of conveying the title, exled the leffor from the legal guilt of maintenance (o). hen therefore a person, who hath right of entry into lands, termines to acquire that possession, which is wrongfully thield by the present tenant, he makes (as by law he may) a malentry on the premises; and being fo in possession of the he there, upon the land, feals and delivers a leafe for years some third person or lessee: and, having thus given him try, leaves him in possession of the premises. This lesse to flay upon the land, till the prior tenant, or he who had the mous possession, enters thereon afresh and ousts him; or till me other person (either by accident or by agreement beforead) comes upon the land, and turns him out or ejects him.

15

For

⁽¹⁾ See append. No. H. S. 4. prope fin. (m) 7 Edw. IV. 6.

Fairfax; si bomo port ejectione firmae, le plaintiss recovera son
mo qui est arere, sibien come in quare ejecit infra terminum; et,
nul soit arere, donques tout in damages. (Bro. Abr.; t. quare
tit infra terminum, 6.) (n) F. N. B. 220. (o) 1 Ch.
p. append. 39.

har

is

ate

Vil

on

tio

ritt

eor

ich

on;

o ti

nd t

is o

udgr enan

n re

oes 1

ed a

o rig

ne ca

f po

Bu

ant,

rule

ourr

(p)

For this injury the leffee is entitled to his action of ejectment against the tenant, or this casual ejector, whichever it was that ousted him, to recover back his term and damages. But where this action is brought against fuch a cafual ejector as is before mentioned, and not against the very tenant in possession, the court will not fuffer the tenant to lose his possession without any opportunity to defend it. Wherefore it is a standing rule, that no plaintiff shall proceed in ejectment to recover lands against a casual ejector, without notice given to the tenant in possession (if any there be) and making him a defendant if he pleases. And, in order to maintain the action, the plaintiff must, in case of any defence, make out four points before the court; viz. title, leafe, entry and oufer. First, he must shew a good title in his lessor, which brings the matter of right entirely before the court; then, that the lesfor, being seised by virtue of such title, did make him the leafe for the present term; thirdly, that he, the lessee or plaintiff, did enter or take possession in consequence of such leafe; and then, laftly, that the defendant ouffed or ejected him. Whereupon he shall, in consequence, have a writ of possession, which the sheriff is to execute, by delivering him the undiff turbed and peaceable poffession of his term.

This is the regular method of bringing an action of ejectment, in which the title of the leffor comes collaterally and
incidentally before the court, in order to shew the injury
done to the lessee by this ouster. This method must be fill
continued in due form and strictness, save only as to the
notice to the tenant, whenever the possession is vacant, of
there is no actual occupant of the premises; and also in some
other cases. But, as much trouble and formality were found
to attend the actual making of the lease, entry, and outer
a new and more easy method of trying titles by writ of ejectment, where there is any actual tenant or occupier of the
premises in dispute, was invented somewhat more than a century ago, by the lord chief justice Rolle, who then sat in the
court of upper bench; so called during the exile of king Charle

at re re ne ut so er he n- n, ur re gs he he n-

esecond. This new method entirely depends upon a string flegal fictions: no actual lease is made, no actual entry by e plaintiff, no actual ouster by the defendant; but all are erely ideal, for the fole purpose of trying the title. To is end, in the proceedings (p) a lease for a term of years is ated to have been made, by him who claims title, to the aintiff who brings the action; as by John Rogers to Riard Smith: which plaintiff ought to be fome real person, d not merely an ideal fictitious one who has no existence, is frequently though unwarrantably practifed (q): it is also ated that Smith, the leffee, entered; and that the defendant Villiam Stiles, who is called the cafual ejector, oufted him; which ouster he brings this action. As soon as this acon is brought, and the complaint fully stated in the declation (r), Stiles, the casual ejector, or defendant, sends a nitten notice to the tenant in possession of the lands, as forge Saunders, informing him of the action brought by ichard Smith, and transmitting him a copy of the declaraon; withal affuring him that he, Stiles the defendant, has o title at all to the premises, and shall make no defence; d therefore advising the tenant to appear in court and defend is own title: otherwise he, the casual ejector, will suffer adgment to be had against him; and thereby the actual mant Saunders will inevitably be turned out of possession(s). n receipt of this friendly caution, if the tenant in possession oes not within a limited time apply to the court to be admit-. da defendant in the stead of Stiles, he is supposed to have right at all; and, upon judgment being had against Stiles e casual ejector, Saunders the real tenant will be turned out possession by the sheriff.

But, if the tenant in possession applies to be made a defenant, it is allowed him upon this condition; that he enter into rule of court (t) to confess, at the trial of the cause, three of the courrequisites for the maintenance of the plaintiff's action; viz.

⁽p) See append. No. II. §. 1, 2. (q) 6 Mod. 309. (r) Append. lo. II. §. 2. (s) Ibid. (t) Ibid. §. 3.

in

t

n, ltl

e t

e fi

10

da

ftay

s t

con

THI

ly t

fide

ite;

ial f

pof

actio

reco

WIC

nan

leffo

ty to

UCI

the t

ater

pted

ncipl

mer le re

ining

bein

ut to

. 7

(x)

the leafe of Rogers the leffor, the entry of Smith the plaintiff. and his oufter by Saunders himself, now made the defendant instead of Stiles: which requisites, as they are wholly sellis. ous, should the defendant put the plaintiff to prove, he must of course be nonfuited for want of evidence; but by fuch flipulated confession of lease, entry, and ouster, the trial will now fland upon the merits of the title only. This done the declaration is altered by inferting the name of George Samders instead of William Stiles, and the cause goes down to trial under the name of Smith (the plaintiff) on the demised Rogers, (the leffor) against Saunders, the new defendant And therein the leffor of the plaintiff is bound to make out a clear title, otherwise his fictitious lessee cannot obtain judge ment to have possession of the land for the term supposed to be granted. But, if the leffor makes out his title in a fail. factory manner, then judgment and a writ of possession hall go for Richard Smith the nominal plaintiff, who by this trid has proved the right of John Rogers his supposed lessor. Yet, to prevent fraudulent recoveries of the possession, by collusor with the tenant of the land, all tenants are obliged by statute 11. Geo. II. c. 19. on pain of forfeiting three years rent to give notice to their landlords, when ferved with any declartion in ejectment: and any landlord may by leave of the court, be made a co-defendant to the action; which indeed he had a right to demand, long before the provision of this flatute (u): in like manner as (previous to the flatute of Westm. 2. c. 3.) if in a real action the tenant of the freehold made default, the remainder-man or reversione had a right to come in and defend the possession; lest if judgment were had against the tenant, the estate of those behind should be turned to a naked right (w). But if the new defendant fails to appear at the trial, and to confes leafe, entry, and oufter, the plaintiff Smith must indeed be there nonfuited, for want of proving those requisites; but judgment will in the end be entered against the casual ejector Stiles: for the condition on which Saunders was admitted a defendant is broken, and therefore the plaintiff is put

⁽u) 7 Med. 70. Salk. 257. (w) Bracton. L 5. c. 10. 9.14

in in the same situation as if he never had appeared at the consequence of which (we have seen) would have not that judgment would have been entered for the plaintiff, the sheriff, by virtue of a writ for that purpose, would eturned out Saunders, and delivered possession to Smith same process therefore as would have been had, provide conditional rule had been ever made, must now be purd as soon as the condition is broken. But execution shall sayed, if any landlord after the default of his tenant aps to be made a defendant, and enters into the usual rule, consess lease, entry, and ouster (x).

I'm damages recovered in these actions, though fordytheir only intent, are now usually (since the title has been
indered as the principal question) very small and inadete; amounting commonly to one shilling or some other
ial sum. In order therefore to complete the remedy, when
possession has been long detained from him that has right,
action of trespass also lies, after a recovery in ejectment
recover the messee profits which the tenant in possession
wrongfully received. Which action may be brought in
name of either the nominal plaintiss in the ejectment, or
lessor, against the tenant in possession; whether he be made
ty to the ejectment, or suffers judgment to go by default(y).

buch is the modern way, of obliquely bringing in questithe title to lands and tenements, in order to try it in this
lateral manner; a method which is now universally
pted in almost every case. It is founded on the same
tiple as the antient writs of assiste, being calculated to try
mere possessory title to an estate; and hath succeeded to
se real actions, as being infinitely more convenient for
lining the end of justice: because, the form of the proceedbeing intirely sictitious, it is wholly in the power of the
let to direct the application of that siction, so as to prevent
and and chicane, and eviscerate the very truth of the
line. The writ of ejectment, and its nominal parties (as

⁽x) Stat. 11 Geo. II. c. 19.

le

fio

not

rife

a c

d t

ke

ter

ove

th

e n

was refolved by all the judges (z) are "judicially to be con-

" the lessor of the plaintiff against the tenant in possession

"invented, under the controll and power of the court, for

"the advancement of justice in many respects; and to fore the parties to go to trial on the merits, without being in

" tangled in the nicety of pleadings on either fide."

But a writ of ejectment is not an adequate means to means to the title of all estates; for on those things, whereon an entry cannot in fact be made, no entry shall be supposed by an siction of the parties. Therefore an ejectment will not lie of an advowson, a rent, a common, or other incorporeal here ditament (a); except for tithes in the hands of lay appropriators, by the express purview of statute 32 Hen. VIII. c. 7 which doctrine hath since been extended by analogy to tithe in the hands of the clergy (b): nor will it lie in such cases where the entry of him that hath right is taken away by descent, discontinuance, twenty years dispossession, or otherwise

This action of ejectment is however rendered a very call and expeditious remedy to landlords whose tenants are in arrere, by statute 4 Geo. II. c. 28. which enacts, that even landlord, who hath by his lease a right of re-entry in case of non-payment of rent, when half a year's rent is due, and in sufficient distress is to be had, may serve a declaration in ejectment on his tenant, or fix the same upon some notorious part of the premises, which shall be valid, without any some re-entry or previous demand of rent. And a recovery such ejectment shall be final and conclusive, both in law and equity, unless the rent and all costs be paid or tendered with in six calendar months afterwards.

2. THE writ of quare ejecit infra terminum lieth, by the artient law, where the wrongdoer or ejector is not himself in posses

and chicago, hard reviliences the very truth of ve

⁽z) Mich. 32 Geo. II. 4 Burr. 568. (a) Brownl. F. Cro. Car. 492. Stra. 54. (b) Cro. Car. 301. 2 kg Raym. 789.

)rce

ria.
7.
her

of the lands, but another who claims under him. ere a man leaseth lands to another for years, and, after, leffor or reversioner entereth, and maketh a feoffment in or for life, of the fame lands to a stranger: now the e cannot bring a writ of ejectione firmae or ejectment inft the feoffee; because he did not eject him, but the refioner: neither can he have any fuch action to recover his m against the reversioner, who did oust him; because he not now in possession, and upon that account this writ was ried, upon the equity of the statute Westm. 2. c. 24. as a case where no adequate remedy was already provided (c). d the action is brought against the feoffee for deforcing, keeping out, the original leffee during the continuance of term: and herein, as in the ejectment, the plaintiff shall over fo much of the term as remains, and also damages that portion of it whereof he has been unjustly deprived. t fince the introduction of fictitious ousters, whereby the emay be tried against any tenant in possession (by what ans soever he acquired it) this action is fallen into disuse.

of traject of trepolition is larger and one fronteend one frontees are trained to be seen to be see

conservation of the first areas to eliculate the training of the straining of the straining

and her in the case, or are and a substitute of the common we

(c) F. N. B. 198.

de la main estate sousent de Chapter

Bu

fer ne

ce e

s ri

ry lly

fsic

ítio

roh

ly

OW

ca

yv

om

ion

que

nce

ne o

EVE

tles

t of

re .

the

hbo

one

idea

CHAPTER THE TWELPTH.

OF TRESSPASS.

San the control of th

to synctomia o of a paintly state of the

I N the two preceding chapters we have confidened fuch in juries to real property, as confident in an outler, or am tion of the possession. Those which remain to be discussioned are such as may be offered to a man's real property without any amotion from it.

THE second species therefore of real injuries, or wrong that affect a man's lands, tenements, or hereditaments, is the of trespass. Trespass, in its largest and most extensive sens fignifies any transgression or offence against the law of nature of society, or of the country in which we live; whether relates to a man's person, or his property. Therefore beating another is a trespass; for which (as we have formerly sen an action of trespass vi et armis in affault and battery will is taking or detaining a man's goods are respectively trespasses for which an action of trespass qui et armis or on the cale trover and conversion, is given by the law: so also non-po formance of promises or undertakings is a trespass, upon which an action of trespass on the case in assumpsit is grounded: and in general, any misfeafance, or act of one man where another is injuriously treated or damnified, is a transgression or trespass in its largest sense; for which we have alread Sen (a), that, whenever the act itself is directly and imme diatel

tely injurious to the person or property of another, and refore necessarily accompanied with some force, an action trespass vi et armis will lie; but, if the injury is only convential, a special action of trespass on the case may be night.

But in the limited and confined sense, in which we are at fent to confider it, it fignifies no more than an entry on aner man's ground without a lawful authority, and doing e damage, however inconsiderable, to his real property. the right of meum and tuum, or property, in lands being e established, it follows as a necessary consequence, that right must be exclusive; that is, that the owner may reto himself the sole use and occupation of his soil: every ry therefore thereon without the owner's leave, and espely if contrary to his express order, is a trespass or transsion. The Roman laws feem to have made a direct protion necessary, in order to constitute this injury : " qui alieum fundum ingreditur, potest a domino, si is praeviderit, robiberi ne ingrediatur (b)." But the law of England, ly considering that much inconvenience may happen to owner, before he has an opportunity to forbid the entry, carried the point much farther, and has treated every y upon another's lands, (unless by the owner's leave, or ome very particular cases) as an injury or wrong, for satifion of which an action of trespass will lie; but determines quantum of that satisfaction, by considering how far the ace was wilful or inadvertent, and by estimating the e of the actual damage fustained.

ites a trespass by breaking his close; the words of the tof trespass commanding the defendant to shew cause, re clausam querentis fregit. For every man's land is the eye of the law inclosed and set apart from his subour's: and that either by a visible and material fence, one field is divided from another by a hedge; or by ideal invisible boundary, existing only in the contem-

la

th

rs,

ent

th

nar

tti

lea

ion

AM

his

on 1 ves

bag

ich

es

mit

ng

by act

trefi

nfel

ereb

usun

tum

aftu

vays

pr

plation of law, as when one man's land adjoins to another in the same field. And every such entry or breach of man's close carries necessarily along with it some damage of other: for, if no other special loss can be assigned, yet fil the words of the writ itself specify one general damage, viz the treading down and bruifing his herbage (c).

ONE must have a property (either absolute or temporary in the foil, and actual possession by entry, to be able to main tain an action of trespass: or at least, it is requisite that h party have a leafe and possession of the vesture and herbas of the land (d). Thus if a meadow be divided annual among the parishioners by lot, then, after each person feveral portion is allotted, they may be respectively capable of maintaining an action for the breach of their several close (e); for they have an exclusive interest and freehold them for the time. But before entry and actual possession, or cannot maintain an action of trespass, though he hath the freehold in law (f). And therefore an heir before entry can not have this action against an abator; though a disselle might have it against a diffeisor, for the injury done by diffeifin itself, at which time the plaintiff was seised of the land : but he cannot have it for any act done after the differing until he hath gained poffession by re-entry, and then he may well maintain it for the intermediate damage done; for all his re-entry, the law, by a kind of jus postliminii, suppost the freehold to have all along continued in him (g). Neith by the common law, in case of an intrusion or deforcement could the party kept out of possession sue the wrongdoer a mode of redress, which was calculated merely for injure committed against the land while in the possession of the owner. But by the statute 6 Ann. c. 18. if a guardin or trustee for any infant, a husband seised jure uxon or a person having any estate or interest determinable up a life or lives, shall, after the determination of their st **Spectir**

⁽c) F. N. B. 87, 88. (d) Dyer. 285. 2 Roll. Abr. 549. (e) Co Eliz. 421. (f) 2 Roll. Abr. 553. (g) 11 Rep. 5.

12

tive interests, hold over and continue in possession of lands or tenements, they are now adjudged to be trespafs; and the reversioner or remainder-man may once in ry year, by motion to the court of chancery, procure the my que vie to be produced by the tenant of the land, or may er thereon in case of his refusal or wilful neglect. And, the statutes of 4 Geo. II. c. 28. and 11 Geo. II. c. 19. in , after the determination of any term of life, lives, or s, any person shall wilfully hold over the same, the lessor mitled to recover by action of debt, either a rent of douthe annual value of the premises, in case he himself hath nanded and given notice in writing to deliver the poffef-; or else double the usual rent, in case the notice of ting proceeds from any tenant having power to determine lease, and he afterwards neglects to carry it into due exeion.

A MAN is answerable for not only his own trespass, but that his cattle also: for if by his negligent keeping they stray on the land of another (and much more if he permits, or res them on) and they there tread down his neighbour's bage, and spoil his corn or his trees, this is a trespass for ich the owner must answer in damages. And the law es the party injured a double remedy in this case; by mitting him to destrein the cattle thus damage-feasant, or ng damage, till the owner shall make him satisfaction; or by leaving him to the common remedy in foro contentiofo, action. And the action that lies in either of these cases, trespass committed upon another's land, either by a man nelf or his cattle, is the action of trespass vi et armis; creby a man is called upon to answer, quare vi et armis sum ipsius A. apud B. fregit, et blada ipsius A. ad valentiam um solidorum ibidem nuper crescentia cum quibusdam averiis offus fuit, conculcavit, et consumpsit, &c. (h): for the law vays couples the idea of force with that of intrusion upon property of another. And herein, if any unwarrant312

cal

).

i

tha

rie

1 n t

are

ln tra

affu

t,

m

ot

19. dlo

pred cific

de. feein

if

vn a

ent

ac hal

of akir

m) Lev Cro

. 56

able act of the defendant or his beafts in coming upon land be proved, it is an act of trespass for which the plain tiff must recover some damages; such however as the shall think proper to affess.

In trespasses of a permanent nature, where the injury continually renewed, (as by spoiling or confuming the be age with the defendant's cattle) the declaration may all the injury to have been committed by continuation from given day to another, (which is called laying the action a continuando) and the plaintiff shall not be compelled to be separate actions for every day's separate offence (i). I where the trespass is by one or several acts, each of whi terminates in itself, and being once done cannot be done ag it cannot be laid with a continuando; yet if there be repeat acts of trespass committed, (as cutting down a certain m ber of trees) they may be laid to be done, not continual but at divers days and simes within a given period (k).

In some cases trespass is justifiable; or, rather entry another's land or house shall not in those cases be account trespass: as if a man comes there to demand or pay mon there payable; or to execute, in a legal manner, the prod of the law. Also a man may justify entering into an im public house, without the leave of the owner first spot ally asked: because, when a man professes the keeping fuch inn or public house, he thereby gives a gent licence to any person to enter his doors. So a landlord m justify entering to diffrein for rent; a commoner to atto his cattle, commoning on another's land; and a reversion to fee if any waste be committed on the estate; for the parent necessity of the thing (1). Also it hath been said, the by the common law and custom of England the poor are lowed to enter and glean upon another's ground after the

⁽i) 2. Roll. Abr. 545. Lord Rayma 240. (k) Salk. 638,63 Lord Raym. 823. 7 Mod. 152. (1) 8 Rep. 146.

without being guilty of trespass (m) : which humane willon feems borrowed from the mofaical law (n). In like oner the common law warrants the hunting of ravenous as of prey, as badgers and foxes, in another man's land: que the destroying fuch creatures is profitable to the public But in cases where a man misdemeans himself, or makes ill use of the authority with which the law entrusts him. hall be accounted a trefpaffer ab initio (p) : as if one comes a tavern and will not go out in a reasonable time, but is there all night contrary to the inclination of the ownthis wrongful act shall affect and have relation back to his first entry, and make the whole a trespass (q). But are non-feafance, as not paying for the wine he calls for, not make him a trespasser; for this is only a breach of tract, for which the taverner shall have an action of debt fumpfit against him (r). So if a landlord distreined for t, and wilfully killed the diftress, this by the common made him a trespasser ab initio (s): and so indeed would other irregularity have done, till the statute 11 Geo. II. o. which enacts, that no fublequent irregularity of the dord shall make his first entry a trespass; but the party ared shall have a special action on the case for the real the injury sustained, unless tender of amends hath been te. But still, if a reversioner, who enters on pretence feeing waste, breaks the house, or stays there all night; if the commoner who comes to tend his cattle, cuts matree; in these and similar cases the law judges that entered for this unlawful purpose, and therefore, as act which demonstrates such his purpose is a trespass, hall be esteemed a trespasser ab initio (t). So also in the of hunting the fox or the badger, a man cannot justify king the foil, and digging him out of the earth: for though

ry

unt

one

root

(per

ng

ener

atte

ione

le a

are a

m) Gilb. Ev. 253. Trials per pais. ch. 15. pag. 438. Levit. c. 19. v. 9. & c. 23. v. 22. Deut. c. 24. v. 19. &c. Cro. Jac. 321. (p) Finch. L. 47. Cro. Jac. 148. (q) 2 Roll. 1561. (r) 8 Rep. 147. (s) Finch. L. 47. (t) 3 Rep. 146.]

iti

ly ho

fo

oth

ve

ſs,

public good, yet it is held (u) that such things must bed in an ordinary and usual manner; therefore, as there is ordinary course to kill them, viz. by hunting, the court that the digging for them was unlawful.

A MAN may also justify in an action of trespass, on count of the freehold and right of entry being in him and this defence brings the title of the estate in question. It is therefore one of the ways devised, since the disuse of actions, to try the property of estates; though it is no usual as that by ejectment, because that, being now a min action, not only gives damages for the ejection, but also possion of the land: whereas in trespass, which is merely a sonal suit, the right can be only ascertained, but no possed delivered; nothing being recovered but damages for wrong committed.

In order to prevent trifling and vexatious actions of tref as well as other personal actions, it is (inter alia) enactor Statutes 43 Eliz. c. 6. and 22. and 23 Car. II. c. 9. 6. that where the jury, who try an action of trespals, give damages than forty shillings, the plaintiff shall be allo no more costs than damages; unless the judge shall co under his hand that the freehold or title of the land chiefly in question. But this rule now admits of two ex tions more, which have been made by fubsequent flatt One is by ftatute 8 & 9 W. III. c. 11. which enacts, in all actions of trespass, wherein it shall appear that trespass was wilful and malicious, and it be so certified the judge, the plaintiff shall recover full costs. Every pass is wilful, where the defendant has notice, and is the ally forewarned not to come on the land; as every trefpa malicious, though the damage may not amount to forty lings, where the intent of the defendant plainly appears to or ited is 7. 22 3 3 . Dett. c.

trass and distress the plaintiff. The other exception is by tute 4 & 5 W. & M. c. 23. which gives full costs against y inferior tradesman, apprentice, or other dissolute person, to is convicted of a trespass in hawking, hunting, fishing, sowling upon another's land. Upon this statute it has been judged, that if a person be an inferior tradesman, as a other for instance, it matters not what qualification he may we in point of estate; but, if he be guilty of such tress, he shall be liable to pay full costs (w).

A TEST SET SET SERVICE SET DESCRIPTION OF THE PROPERTY OF THE

I. In disadring the Perentkinds of a the feder, that, then noteness us may that a breeditt water, and then their that may the

houde for close to make that roof over lange and throws the years off his roof open mine, with a which as attion will be (b). Laid a file on a second will be (b). Laid a file on a second will be (b). Laid a file on a second will be (b). Laid a file on a second of the consequence of the consequence of the consequence.

22 r . 1 Most T (e)

(w) Lord Raym. 149.

CHAPTER

. weilige.

vfu

not

aea

t th

ced

cies

Stop

fome

s to

of pl

like

essary

is to

lead f

his c

does a

place

a nusa

OL. II

9 Rep (f)

CHAPTER THE THIRTEENTH.

OF NUSANCE.

A THIRD species of real injuries to a man's lands tenements, is by nusance. Nusance, nocumentum, or noyance, signifies any thing that worketh hurt, income ence, or damage. And nusances are of two kinds; public common nusances, which affect the public, and are an amance to all the king's subjects; for which reason we must them to the class of public wrongs, or crimes and missem ors: and private nusances; which are the objects of present consideration, and may be defined, any thing do to the hurt or annoyance of the lands, tenements, or her taments of another (a). We will therefore, first, mark the several kinds of nusances, and then their respective medies.

- I. In discussing the several kinds of nusances, we will fider, first, such nusances as may affect a man's corpo hereditaments, and then those that may damage such as incorporeal.
- 1. FIRST, as to corporeal inheritances. If a man built house so close to mine that his roof overhangs my roof, throws the water off his roof upon mine, this is a nusance which an action will lie (b). Likewise to erect a house or a building so near to mine, that it stops up my antient lights winds

(2) Finch. L. 188.

(b) F. N. B. 184.

indows is a nusance of a similar nature (c). But in this ter case it is necessary that the windows be antient, that is, ve subsisted there time out of mind; otherwise there is no ury done. For he hath as much right to build a new edieupon his ground, as I have upon mine: fince every man ay do what he pleases upon the upright or perpendicular of own foil; and it was my folly to build fo near another's ound (d). Also, if a person keeps his hogs, or other noine animals, fo near the house of another, that the stench them incommodes him and makes the air unwholesome. s is an injurious nusance, as it tends to deprive him of the and benefit of his house (e). A like injury is, if one's ghbour fets up and exercises any offensive trade; as a tanis, a tallowchandler's, or the like: for though these are ful and necessary trades, yet they should be exercised in note places; for the rule is, " fic utere tuo, ut alienum non aedas:" this therefore is an actionable nusance (f). So the nusances which affect a man's dwelling may be reed to these three; r. Overhanging it; which is also a ries of trespass, for Cujus est solum ejus est usque ad coelum: Stopping antient lights: and, 3. Corrupting the air with some smells: for light and air are two indispensible requisto every dwelling. But depriving one of a mere matof pleasure, as of a fine prospect, by building a wall, or like; this, as it abridges nothing really convenient or effary, is no injury to the fufferer, and is therefore not an onable nusance (g).

tr

m

of

hen

ırk

ive

ille rpo

1 25

vil

of,

nce

or o

hts indo is to nusances to one's lands: if one erects a smelting-house lead so near the land of another, that the vapor and smoke shis corn and grass, and damages his cattle therein, this is to be a nusance (h). And by consequence it follows, that if does any other act, in itself lawful, which yet being done in place necessarily tends to the damage of another's property, a nusance: for it is incumbent on him to find some other OL. III.

⁹ Rep. 58. (e) 9 Rep. (d) Cro. Eliz. 118. Salk. 459. (f) Cro. Car. 510. (g) 9 Rep. 58.

ti

re

th

it

of

oth

not

of i

ther

to t

and

wife

extre

profi

the r

no n

the ci

ther is

bourh

the pr

chool

njuria

II.]

given f

he law

rong.

ance, b

non to proporti f every

ender w

(8)

place to do that act, where it will be less offensive. So all if my neighbour ought to scour a ditch, and does not, when fore my land is over-flowed, this is an actionable nusance (i).

WITH regard to other corporeal hereditaments: it is an fance to stop or divert water that uses to run to another meadow or mill (k); to corrupt or poisson a water-course, the erecting a dye-house or a lime-pit for the use of trade, into upper part of the stream (1); or in short to do any act the in, that in its consequences must necessarily tend to the prijudice of one's neighbour. So closely does the law of Endand enforce that excellent rule of gospel-morality, of "defining to others, as we would they should do unto ourselves."

2. As to incorporeal hereditaments, the law carries it with the fame equity. If I have a way, annexed to estate, across another's land, and he obstructs me in the of it, either by totally stopping it, or putting logs across or ploughing over it, it is a nusance: for in the first cal cannot enjoy my right at all; and in the latter I cannot joy it so commodiously as I ought (m). Also, if I am titled to hold a fair or market, and another person sets u fair or market so near mine that it does me a prejudice, i a nusance to the freehold which I have in my market or (n). But in order to make this out to be a nusance, it is not fary, 1. That my market or fair be the elder, otherwise nusance lies at my own door. 2. That the market be ered within the third part of twenty miles from mine. For Matthew Hale (o) construes the dieta, or reasonable de journey, mentioned by Bracton (p), to be twenty miles indeed it is usually understood not only in our own law but also in the civil (r), from which we probably borro it. So that if the new market be not within feven mile

⁽i) Hale on F. N. B. 427. (k) F. N. B. 184.

Rep. 59. 2 Roll. Abr. 141. (m) F. N. B. 183. 2 Roll.

140. (n) F. N. B. 184. 2 Roll. Abr. 140. (o) 1 on F. N. B. 184. (p) l. 3. c. 16. (q) 2 Inft. (r) Ff. 2. 11. 1.

the old one, it is no nusance; for it is held reasonable that every man should have a market within one third of a day's journey from his own home; that, the day being divided into three parts, he may spend one part in going, another in returning, and the third in transacting his necessary business there. If fuch market or fair be on the same day with mine. it is brima facie a nusance to mine, and there needs no proof of it, but the law will intend it to be fo: but if it be on any other day, it may be a nufance; though whether it is fo or not, cannot be intended or prefumed, but I must make proof of it to the jury. If a ferry is erected on a river, fo near another antient ferry as to draw away its custom, it is a nusance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness, for the ease of all the king's subjects; otherwife he may be grievously amerced (s): it would be therefore extremely hard, if a new ferry were suffered to share his profits, which does not also share his burthen. But, where the reason ceases, the law also ceases with it: therefore it is no nusance to erect a mill so near mine, as to draw away the custom, unless the miller also intercepts the water. Neither is it a nusance to set up any trade, or a school, in neighbourhood or rivalship with another: for by such emulation he public are like to be gainers; and, if the new mill or thool occasion a damage to the old one, it is damnum absque injuria (t).

II. LET us next attend to the remedies, which the law has ewen for this injury of nusance. And here I must premise that he law gives no private remedy for any thing but a private mong. Therefore no action lies for a public or common nuance, but an indictment only: because the damage being comnon to all the king's subjects, no one can assign his particular roportion of it; or, if he could, it would be extremely hard, fevery subject in the kingdom were allowed to harrass the ofender with separate actions. For this reason, no person, natural K 2

⁽s) 2 Roll. Abr. 140. (t) Hale on F. N. B. 184.

th

th

th

for

ı.

WI

not

me

imi

tute

in c

The

" cu

this

whe

levie

" juf

alien

"quo

For

fance

the a

levied

3.

ion of

nis que

(2)]

(c)

or corporate, can have an action for a public nusance, or pu. nish it; but only the king in his public capacity of fupreme governor, and pater-familias of the kingdom (u). Yet this rule admits of one exception; where a private person suffers some extraordinary damage, beyond the rest of the king's fubjects, by a public nusance: in which case he shall have a private fatisfaction by action. As if, by means of a ditch dug across a public way, which is a common nusance, a man or his horse suffer any injury by falling therein; there, for this particular damage, which is not common to others, the party shall have his action (w). Also if a man hath abated, or removed, a nusance which offended (him as we may remember it was stated, in the first chapter of this book, that the party injured hath a right to do) in this case he is entitled to no action (x). For he had choice of two remedies; either without fuit, by abating it himself, by his own mere act and authority; or by fuit, in which he may both recover damages, and remove it by the aid of the law: but, having made his election of one remedy, he is totally precluded from the other.

THE remedies by fuit, are, 1. By action on the case for damages; in which the party injured shall only recover a fatisfaction for the injury sustained; but cannot thereby remove the nusance. Indeed every continuance of a nusance is held to be a fresh one (y); and thereby a fresh action will lie, and every exemplary damage will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it. Yet the founders of the law of England did not rely upon probabilities merely, in order to give relief to the injured. They have therefore provided two other actions; the affife of nusance, and the writ of quod permittal profternere: which not only give the plaintiff fatisfaction for his injury past, but also strike at the root and remove the cause itself, the nusance that occasioned the injury. These two actions however can only be brought by the tenant of the

⁽u) Vaugh. 341, 342. (w) Co. Litt. 56. 5. Rep. 73. (1)9
Rep. 55. (y) 2 Leon. pl. 129. Cro. Eliz.

n,

nd

the freehold; so that a lessee for years is confined to his action upon the case (z).

- 2. An affife of nusance is a writ, wherein it is stated that the party injured complains of some particular fact done, ad mocumentum liberi tenementi sui, and therefore commanding the sheriff to summon an assise, that is, a jury, and view the premises, and have them at the next commission of assises, that justice may be done therein (a): and, if the affise is found for the plaintiff, he shall have judgment of two things; 1. To have the nusance abated; and 2. To recover damages (b). Formerly an affife of nusance only lay against the very wrongdoer himself who levied, or did, the nusance; and did not lie against any person to whom he had aliened the tenements, whereon the nusance was situated. This was the immediate reason for making that equitable provision in statute Westm. 2. 13 Edw. I. c. 24. for granting a similar writ, in casu consimili, where no former precedent was to be found. The statute enacts, that " de caetero non recedant querentes a "curia domini regis, pro eo quod tenementum transfertur de "uno in alium;" and then gives the form of a new writ in this case: which only differs from the old one in this, that, where the affise is brought against the very person only who levied the nusance, it is said, " quod A. (the wrongdoer) in-"juste levavit tale nocumentum;" but, where the lands are aliened to another person, the complaint is against both; "quod A. (the wrongdoer) et B. (the alienee) levaverunt (c)." For every continuation, as was before said, is a fresh nufance; and therefore the complaint is as well grounded against he alience who continues it, as against the alienor who first levied it.
- 3. BEFORE this statute, the party injured, upon an alienation of the land wherein the nusance was set up, was driven to his quod permittat presternere; which is in the nature of a write K 3

⁽²⁾ Finch. L. 289. (a) F. N. B. 183. (b) 9 Rep. 55. (c) Ibid.

ite

те

e at

is i

at 1

rds

rve

due

eafu

it m

ten

e far

c.

ck-re

e der

cupie

es of

urtee

reof,

alfo en th

vin,

es his ht, su

holde claime ant wl

estate.

h) F. 1 206.

of right, and therefore subject to greater delays (d). This is a writ commanding the defendant to permit the plaintiff to abate, quod permittat prosernere, the nusance complained of; and, unless he so permits, to summon him to appear in court and shew cause why he will not (e). And this writ lies as well for the alienee of the party first injured, as against the alienee of the party first injuring; as hath been determined by all the judges (f). And the plaintiff shall have judgment herein to abate the nusance, and to recover damages against the defendant.

BOTH these actions, of assign of nusance, and of quod permittat profternere, are now out of use, and have given way to the action on the case; in which, as was before observed, no judgment can be had to abate the nusance, but only to recover damages. Yet, as therein it is not necessary that the freehold should be in the plaintiff and defendant respectively, as it must be in these real actions, but it is maintainable by one that hath possession only, against another that hath like possession, the process is therefore easier: and the effect will be much the fame, unless a man has a very obstinate as well as an ill-natured neighbour; who had rather continue to pay damages, than remove his nusance. For in such case, re course must at last be had to the old and fure remedies, which will effectually conquer the defendant's perverseness, by send ing the sheriff with his posse comitatus, or power of the county to level it.

(d) 2 last. 405.

(e) F. N. B. 124.

(f) 5 Rep

- CHAPTE

pon the premises; or unless the tenant hath so enclosed the and, that the lord cannot come upon it to distrein (h). For he law prefers the simple and ordinary remedies, by distress, by the actions just now mentioned, to this extraordinary ne of forfeiture for a cessavit; and therefore the same statte of Glocester has provided farther, that upon tender of rears and damages before judgment, and giving fecurity or the future performance of the services, the process shall eat an end, and the tenant shall retain his land. is the statute of Westm. 2. conforms, so far as may stand ith convenience and reason of law (i). It is easy to observe, at the statute (k) 4 Geo. II. c. 28. (which permits landrds who have right of re-entry for non-payment of rent, to rve an ejectment on their tenants, when a half year's rent due, and there is no diffress on the premises) is in some easure copied from the antient writ of cessavit: especially it may be fatisfied and put an end to in a fimilar manner, tender of the rent and costs within six months after. And fame remedy is, in substance, adopted by statute 11 Geo. c. 19. §. 16. which enacts, that where any tenant at k-rent shall be one year's rent in arrear, and shall desert edemised premises, leaving the same uncultivated or uncupied, fo that no sufficient distress can be had; two juses of the peace (after notice affixed on the premises for urteen days without effect) may give the landlord poffession ereof, and thenceforth the lease shall be void. 5. There also another very effectual remedy, which takes place en the tenant upon a writ of assise for rent, or on a rewin, disowns or disclaims his tenure, whereby the lord ts his verdict: in which case the lord may have a writ of ht, sur disclaimer, grounded on this denial of tenure; and , upon proof of the tenure, recover back the land itself holden, as a punishment to the tenant for such his false daimer (1). This piece of retaliating justice, whereby the ant who endeavours to defraud his lord is himself deprived of estate, as it evidently proceeds upon feodal principles, so it

h) F. N. B. 209. 2 Inft. 298. (i) 2 Inft. 401. 460. (k) See 206. (l) Finch. L. 270, 271.

ne

n ife

na ufl

en

f.v

et,

raft

enai

ho

II.

reve

f eft

1.

me

y at

on r

ff; t

ten

no

ay 1

afte

eakne

ve a

(d) 5 tt. 53. 6 Ed

is expressly to be met with in the feodal constitutions (m) " vasallus, qui abnegavit feudum ejusve conditionem, exsolu " bitur."

AND, as on the one hand the antient law provided the feveral remedies to obviate the knavery and punish the ingr titude of the tenant, so on the other hand it was equally car ful to redress the oppression of the lord; by furnishing, The writ of ne injuste vexes (n); which is an antient w founded on that chapter (o) of magna carta, which prohib diffresses for greater services than are really due to the lon being itself of the prohibitory kind, and yet in the nature a writ of right (p). It lies, where the tenant in fee-sim and his ancestors have held of the lord by certain service and the lord hath obtained seisin of more or greater service by the inadvertent payment or performance of them by tenant himself. Here the tenant cannot in an avowry are the lord's possessory right, because of the seisin given by own hands; but is driven to this writ, to devest the lor possession, and establish the mere right of property, by certaining the fervices, and reducing them to their pro standard, But this writ does not lie for tenant in tail; for may avoid fuch seisin of the lord, obtained from the p ment of his ancestors, by plea to an avowry in replevin 2. The writ of mesne, de medio; which is also in the nat of a writ of right (r), and lies, when upon a subinfeudat the mesne or middle lord (s) suffers his under-tenant, or ten paravail, to be distreined upon by the lord paramount, the rent due to him from the mesne lord (t). And in s case the tenant shall have judgment to be acquitted (or demnified) by the mesne lord; and if he makes default the in, or does not appear originally to the tenant's writ, hel be forejudged of his mesnalty, and the tenant shall hold in diately of the lord paramount himself (u).

II. TH

⁽m) Feud. l. 2. 1. 26. (n) F. N. B. 10. (o) c. 10. (p) Bo 126. (q) F. N. B. 11. 2 Inft. 21. (r) Booth, 136. (s) See II. ch. 5. pag. 59, 60. (t. F. N. B. 135. (u) 2 Inft. 374.

re

mp içe vic

y (

avo

by I

lor

by pro

for

e pa

n (

dat

ten

nt,

in fi

(or t the

he I

im

T

) Bo

See

nade liable by the statutes of Marlbridge (d) and of Gloceser) (e) if the particular tenant, I fay, commits or fuffers my waste, it is a manifest injury to him that has the inheriance, as it tends to mangle and difmember it of its most deirable incidents and ornaments, among which timber and oules may justly be reckoned the principal. To him herefore in remainder or reversion the law hath given a renedy; that is, to him to whom the inheritance appertains n expectancy (f). For he, who hath the remainder for fe only, is not entitled to fue for waste: since his interest nay never perhaps come into possession, and then he hath iffered no injury. Yet a person, vicar, arch-deacon, preendary, and the like, who are feifed in right of their hurches of any remainder or reversion, may have an action fwaste; for they, in many cases, have for the benefit of he church and of the fuccessor a fee-simple qualified: and et, as they are not seised in their own right, the writ of rafte shall not say, ad exhaeredationem ipsius, as for other mants in fee-simple; but ad exhaeredationem ecclesiae, in hose right the fee-simple is holden (g).

II. THE redress for this injury of waste is of two kinds, eventive, and corrective: the former of which is by writ effrepement, the latter by that of waste.

n. Estrepement is an old French word, fignifying the me as waste or extirpation: and the writ of estrepement y at the common law, after judgment obtained in any acom real (h), and before possession was delivered by the sheaf; to stop any waste which the vanquished party might tempted to commit in lands, which were determined to no longer his. But, as in some cases the demandant ay be justly apprehensive, that the tenant may make aske or estrepement pending the suit, well knowing the takens of his title, therefore the statute of Glocester (i) we another writ of estrepement, pendente placito, commanding

⁽d) 52 Hen. III. c. 23. (e) 6 Edw. I. c. 5. (f) Co: tt. 53. (g) Ibid. 341. (h) 2 Inft. 328.

an

in

lif

ye

tu

an

in

ter

par

tho

in

tut

ma

to

manding the sheriff firmly to inhibit the tenant " ne facial " vastum vel estrepamentum pendente placito dicto indiscusso(k)." And, by virtue of either of these writs the sheriff may resil them that do, or offer to do, waste; and, if otherwise h cannot prevent them, he may lawfully imprison the wasters or make a warrant to others to imprison them: or, if necessity fity require, he may take the poffe comitatus to his affiftance So odious in the fight of the law is waste and destruction (1) In fuing out these two writs this difference was formerly ob ferved; that in actions merely possessory, where no dama ges are recovered, a writ of effrepement might be had at an time, pendente lite, nay even at the time of fuing out th original writ, or first process: but, in an action where da mages were recovered, the demandant could only have writ of estrepement, if he was apprehensive of waste after verdict had (m); for, with regard to waste done before the verdict was given, it was prefumed the jury would confide that in affesfing the quantum of damages. But now it seen to be held, by an equitable construction of the statute Glocester, and in advancement of the remedy, that a w of estrepement, to prevent waste, may be had in every stag as well of fuch actions wherein damages are recovered, as those wherein only possession is had of the lands: for pe adventure, faith the law, the tenant may not be of ability fatisfy the demandant his full damages (n). And therefo now, in an action of waste itself, to recover the pla wasted, and also damages, a writ of estrepement will lie, well before as after judgment. For the plaintiff cannot red ver damages for more wafte than is contained in his origin complaint; neither is he at liberty to affign or give in e dence any waste made after the fuing out of the writ: it therefore reasonable that he should have this writ of prese tive justice, since he is in his present suit debarred of any s t'ier remedial (0). If a writ of estrepement, forbidd waste, be directed and delivered to the tenant himself, as may be, and he afterwards proceeds to commit waste, and

⁽k) Regist. 47. (1) 2 Inst. 329. (m) F. N. B. (o) 5 Rep. 115.

per y

tion may be carried on upon the foundation of this writ; wherein the only plea of the tenant can be, non fecit vaftum contra prohibitionem: and, if upon verdict it be found that he did, the plaintiff may recover costs and damages (p); or the party may proceed to punish the defendant for the contempt: for if, after the writ directed and delivered to the tenant or his servants, they proceed to commit waste, the court will imprison them for this contempt of the writ (q). But not so, if it be directed to the sheriff; for then it is incumbent upon him to prevent the estrepement absolutely, even by raising the posse comitatus, if it can be done no other way.

Besides this preventive redress at common law, the courts of equity, upon bill exhibited therein, complaining of waste and destruction, will grant an injunction or order to stay waste, until the defendant shall have put in his answer, and the court shall thereupon make farther order. Which is now become the most usual way of preventing waste.

2. A WRIT of waste is also an action, partly founded upon the common law, and partly upon the statute of Glocester (r); and may be brought by him who hath the immediate estate of inheritance in reversion or remainder, against the tenant for life, tenant in dower, tenant by the curtefy, or tenant for years. This action is also maintainable in pursuance of statute (s) Westm. 2. by one tenant in common of the inheritance against another, who makes waste in the estate holden in common. The equity of which statute extends to jointtenants, but not to coparceners: because by the old law coparceners might make partition, whenever either of them thought proper, and thereby prevent future waste, but tenants in common and joint-tenants could not; and therefore the statute gave them this remedy, compelling the defendant either to make partition, and take the place wasted to his own share, or to give security not to commit any farther waste (t). But these

⁽p) Moor 100. (s) 13 Edw. I. c, 22. (q) Hob. 85. (t) 2 Inst. 403, 404.

d: ih

na

1

y

lain

ned ill

are

ne d

ne i

red

(y)

ni/

tenants in common and joint-tenants are not liable to the penalties of the statute of Glocester, which extends only to such as have life-estates, and do waste to the prejudice of the inheritance. The waste however must be something confiderable; for if it amount only to twelve pence, or some such petty sum, the plaintiff shall not recover in an action of waste: nam de minimis non curat lex (u).

THIS action of waste is a mixed action; partly real, so far as it recovers land, and partly personal, so far as it recovers damages. For it is brought for both those purposes; and, if the waste be proved, the plaintiff shall recover the thing or place wasted, and also treble damages, by the statute of Glocefter. The writ of waste calls upon the tenant to appear and shew cause, why he hath committed waste and destruction in the place named, ad exhaeredationem, to the difinherifon of the plaintiff (w). And if the defendant makes default, or does not appear at the day affigned him, then the sheriff is to take with him a jury of twelve men, and go in person to the place alleged to be wasted, and there enquire of the waste done, and the damages; and make a return or report of the fame to the court, upon which report the judgment is founded (x). For the law will not fuffer so heavy judgment, as the forfeiture and treble damages, to be paffet upon a mere default, without full affurance that the fact is according as it is stated in the writ. But if the defendant appears to the writ, and afterwards fuffers judgment to go against him by default, or upon a nibil dicit, (when he make no answer, puts in no plea, in defence) this amounts to confession of the waste; since having once appeared, he cannot now pretend ignorance of the charge. Now there fore the sheriff shall not go to the place to enquire of the fact, whether any waste has, or has not, been committed for this is already ascertained by the filent confession of the defendant: but he shall only, as in defaults upon other actions

⁽u) Finch, L. 29. (w) F. N. B. 55. (x) Poph. 24.

I,

e-

to

fi-

ch

of

far ers , if

or lo-

ear

uceri-

de-

the

o in

e of

dg-

vy a

t is dant o go akes

iere.

ted

ons

nak

4.

make enquiry of the quantum of damages (y). The defendant, on the trial, may give in evidence any thing that proves here was no waste committed, as that the destruction hapmened by lightning, tempest, the king's enemies, or other nevitable accident (z). But it is no defence to say, that a transfer did the waste, for against him the plaintiff has no emedy: though the defendant is entitled to sue such stranger in an action of trespass vi et armis, and shall recover the damages he suffered in consequence of such unlawful acts (a).

When the waste and damages are thus ascertained, either y confession, verdict, or enquiry of the sheriff, judgment is iven, in pursuance of the statute of Glocester, c. 5. that the laintiff shall recover the place wasted; for which he has imediately a writ of seison, provided the particular estate be ill subsisting, (for, if it be expired, there can be no forfeire of the land) and also that the plaintiff shall recover treble to damages assessed by the jury; which he must obtain in the same manner as all other damages, in actions personal and mixed, are obtained, whether the particular estate be exited, or still in being.

(y) Cro. Eliz. 18. 290.

(z) Co. Litt. 53.

time give their afficence, by tepting by

that they inculd year to the land court

auto Laura de California de Arremondo la estat

(a) Law

a cano de la desta la viseren sub sino. Chapter

th

eri

And

ble

uit

r to

arty

s is

ill

nade

actio with 1

tim

alled

urpoi

OTI

. By a

hich

medy

ery of

ee ferr

ry ten

CHAPTER THE FIFTEENTH.

OF SUBTRACTION.

Subtraction, which is the fifth species of injurant affecting a man's real property, happens, when any fon who owes any suit, duty, custom, or service to anoth withdraws or neglects to perform it. It differs from a different sin, in that this is committed without any denial of the reconsisting merely in non-performance; that strikes at very title of the party injured, and amounts to an ouste actual dispossession. Subtraction however, being clearly injury, is remediable by due course of law: but the rem differs according to the nature of the services; whether the due by virtue of any tenure, or by custom only.

I. FEALTY, suit of court, and rent, are duties and ser usually issuing and arising ratione tenurae, being the cons upon which the antient lords granted out their land their feudatories: whereby it was stipulated, that they their heirs should take the oath of fealty or sidelity to lord, which was the feodal bond or commune vinculum tween lord and tenant; that they should do suit, or dul tend and follow the lord's courts, and there from the time give their assistance, by serving on juries, either the cide the property of their neighbours in the court-bard correct their misdemessnors in the court-leet; and, I that they should yield to the lord certain annual state turns, in military attendance, in provisions, in arms, in ters of ornament or pleasure, in rustic employments or provisions.

y p

oth

dif

rig

at

ufte

arly

rem

er f

fer

con

land

they to

ulum

dul

1 tin

ner t

baro

d, 1

state s, in or pr

lab

abours, or (which is instar omnium) in money, which will provide all the rest; all which are compromised under the one general name of reditus, return, or rent. And the sub-raction or non-observance of any of these conditions, by neglecting to swear fealty, to do suit of court, or to render the ent or service reserved, is an injury to the freehold of the ord, by diminishing and depreciating the value of his signory.

THE general remedy for all these is by distress; and it is he only remedy at the common law for the two first of them. The nature of distresses, their incidents and consequences, whave before more than once explained (a): it may here iffice to remember, that they are a taking of beafts, or ther personal property, by way of pledge, to enforce the erformance of fomething due from the party distreined upon. and for the most part it is provided that distresses be reasonble and moderate; but, in the case of distress for fealty or uit of court, no diffress can be unreasonable, immoderate, rtoo large (b): for this is the only remedy, to which the arty aggrieved is entitled, and therefore it ought to be such s is fufficiently compulfory; and, be it of what value it illythere is no harm done, especially as it cannot be sold or ade away with, but must be restored immediately on satisaction made. A diffress of this nature, that has no bounds ith regard to its quantity, and may be repeated from time time, until the stubbornness of the party is conquered, is alled a distress infinite; which is also used for some other urposes, as in summoning jurors, and the like.

OTHER remedies for subtraction of rents or services are, By action of debt, for the breach of this express contract, of hich enough has been formerly said. This is the most usual medy, when recourse is had to any action at all for the recours of pecuniary rents, to which species of render almost all the services are now reduced, since the abolition of the milisty tenures. But for a freehold rent, reserved on a lease for

⁽a) See pag. 6. 147.

⁽b) Finch. L. 285.

an

er

ori sta

lud

em

her

S.M.

his

ne

nd

van

o tl

raft

vhat

I.

ave

olut

n th

life, &c. no action of debt lay by the common law, during the continuance of the freehold out of which it iffued (c) for the law would not fuffer a real injury to be remedied by an action that was merely personal. However by the statute 8 Ann. c. 14. and 5 Geo. III. c. 17. actions of debt may now be brought at any time to recover fuch freehold rents, a An affise of mort d'ancestor or novel disseisin will lie of rent as well as of lands (d); if the lord, for the fake of trying the possessory right, will elect to suppose himself ousted or dis feifed thereof. This is now feldom heard of; and all other real actions, being in the nature of writs of right, and therefor more dilatory in their progress, are intirely disused, though not formally abolished by law. Of this species however is 3. The writ de consuetudinibus et ser-vitiis, which lies for the lord against his tenant, who withholds from him the rem and services due by custom, or tenure, for his land (e). This compels a specific payment or performance of the rent of fervices; but there are also others, whereby the lord shall n cover the land itself in lieu of the duty withheld. As,4 The writ of ceffavit: which lies, by the statutes of Gloce ter, 6 Edw. I. c. 4. and of Westm. 2. 13 Edw. I. c. 21 AI. when a man who holds lands of a lord by rent or other fervices, neglects or ceases to perform his services for tw years together; or where a religious house hath lands give it, on condition of performing some certain spiritual service as reading prayers or giving alms, and neglects it; in eith of which cases, if the cesser or neglect have continued forth years, the lord or donor and his heirs shall have a write cessavit to recover the land itself, eo quod tenens in faciena servitiis per biennium jam cessavit (f). And in like manne by the civil law, if a tenant, (who held lands upon pa ment of rent or services, or as they call it " jure emphyteut " co,") neglected to pay or perform them per totum tria nium, he might be ejected from fuch emphyteutic lands (g But by the statute of Glocester, the cessavit does not lie for lands let upon fee-farm rents, unless they have lain fresh a uncultivated for two years, and there be not sufficient differ

⁽c) 1 Roll. Abr. 595. (d) F. N. B. 195. (e) Ibid. 15 (f) Ibid. 208. (g) Cod. 4. 66. 22.

П

c):

ents the dif

the

ougl er is

rent

Thi

nt o

ll re

8, 4

oce

21

othe

r tw

give

rvic

eith

or tw

rit d

ciend

anne

pay

tries

s (g

lie fo

h ar

liftre

upo

d. 15

CHAPTER THE FOURTEENTH.

OF WASTE.

THE fourth species of injury, that may be offered to one's real property, is by waste, or destruction in ands and tenements. What shall be called waste was consiered at large in a former volume (a), as it was a means of offeiture, and thereby transferring the property of real flates. I shall therefore here only beg leave to remind the udent, that waste is a spoil and destruction of the estate, ther in houses, woods, or lands; by demolishing not the imporary profits only, but the very substance of the thing; hereby rendering it wild and defolate; which the common awexpresses very fignificantly by the word vastum: and that his vastum, or waste, is either voluntary or permissive; the me by an actual and designed demolition of the lands, woods, nd houses; the other arising from mere negligence, and ant of sufficient care in reparations, fences, and the like. that my only business is at present to shew, to whom this rafte is an injury; and of course who is entitled to any, and that, remedy by action.

I. The persons, who may be injured by waste, are such as ave some interest in the estate wasted: for if a man be the abolute tenant in fee-simple, without any incumbrance or charge in the premises, he may commit whatever waste his own indif-K 4 cretion

⁽a) See Vol. II. ch. 18.

on ds

(

01

pr

. U

hai

d c

pre

er,

ike

n t

a ac

furz

kil

ted

rho

) th

omp

the

ry o

w) 1

cretion may prompt him to, without being impeachable or a countable for it to any one. And, though his heir is furet be the fufferer, yet nemo est baeres viventis: no man is catain of succeeding him, as well on account of the uncertaint which shall die first, as also because he has it in his ow power to constitute what heir he pleases, according to the civil law notion of an baeres natus and an baeres fastus; of in the more accurate phraseology of our English law, he may aliene or devise his estate to whomever he thinks proper and by such alienation or devise may disinherit his heir at law Into whose hands soever therefore the estate wasted come after a tenant in see-simple, though the waste is undoubted damnum, it is damnum absque injuria.

ONE species of interest, which is injured by waste, is the of a person who has a right of common in the place wasted especially if it be common of estovers, or a right of cuttin and carrying away wood for house-bote, plough-bote, there, if the owner of the wood demolishes the whole wood and thereby destroys all possibility of taking estovers, this an injury to the commoner, amounting to no less than a differing of his common of estovers, if he chooses so to conside it; for which he has his remedy to recover possession and damages by assise, if entitled to a freehold in such common: but if he has only a chattel interest, that he can only recover damages by an action on the case for this waste and destruction of the woods, out of which his estovers were to issue (b).

But the most usual and important interest, that is but be this commission of waste, is that of him who hath the remain der or reversion of the inheritance, after a particular estate so life or years in being. Here, if the particular tenant, (beit the tenant in dower or by curtesy, who was answerable for wastes the common law (c), or the lessee for life or years, who was in 150

I

ret

cer int ow th

ma oper law

me

edl

ted

tin

8

000

is

di

fide

da bu

da

tio

).

t b

ain

e fo

tea

THUS far of the remedies for subtraction of rents or fervices due by tenure. There are also other services. by antient custom and prescription only. Such is that of g fuit to another's mill: where the perfons, refident in ricular place, by usage time out of mind have been acomed to grind their corn at a certain mill; and afteris any of them go to another mill, and withdraw their (their secta, a sequenda) from the antient mill. This is only a damage, but an injury, to the owner; because prescription might have a very reasonable foundation; upon the erection of fuch mill by the ancestors of the er for the convenience of the inhabitants, on condition, when erected, they should all grind their corn there . And for this injury the owner shall have a writ de secta mlendinum (w), commanding the defendant to do his fuit hat mill, quam ad illud facere debet, et folet, or shew cause to the contrary: in which action the validity of prescription may be tried, and if it be found for the er, he shall recover damages against the defendant (x). ke manner, and for like reasons, the register (y) will inus, that a man may have a writ of feeta ad furnum, ad torrale, et ad omnia alia bujusmodi; for suit due to furnum, his public oven or bakehouse; or to his torrale, kiln, or malthouse; when a person's ancestors have ted a convenience of that fort for the benefit of the neighthood, upon an agreement (proved by immemorial cus-) that all the inhabitants should use and resort to it, when led. But besides these special remedies for subtractions, ompel the specific performance of the service due by cusan action on the case will also lie for all of them, to rethe party injured in damages. And thus much for the

ry of subtraction.

w) F. N. B. 123. (x) Co. Entr. 461. (y) Fol. 153.

CHAPTER

236

rip

f

017

on ge

at the

ref

nl

NO

ng

n,

es of

OF DISTURBANCE.

HE fixth and last species of real injuries is that of diff ance; which is usually a wrong done to some inco real hereditament, by hindering or disquieting the owner their regular and lawful enjoyment of it (a). I shall con five forts of this injury; viz. 1. Disturbance of france 2. Disturbance of common. 3. Disturbance of ways. 4. sturbance of tenure. 5. Disturbance of patronage.

I. DISTURBANCE of franchises happens, when a has the franchife of holding a court-leet, of keeping a or market, of free-warren, of taking toll, of feifing wait estrays, or (in short) any other species of franchise what ver; and he is difturbed or incommoded in the lawfule cise thereof. As if another by distress, menaces, or per fions, prevails upon the fuitors not to appear at my co or obstructs the passage to my fair or market; or hunt my free-warren; or refuses to pay me the accustomed or hinders me from seising the waif or estray, whereb escapes or is carried out of my liberty: in every cal this kind, which it is impossible here to recite or fug there is an injury done to the legal owner; his proper damnified, and the profits arifing from fuch his franchife diminished. To remedy which, as the law has given noo

K

nco

wner

con

anch

4.

101

ng a

wait

what

ful e

r per

y cou hunt ned t

nereb

fugg

opert

chife

he is therefore entitled to sue for damages by a special non the case: or, in case of toll, may take a distress if eases (b).

THE disturbance of common comes next to be considered; any act is done, by which the right of another to mmon is incommoded or diminished. This may hapin the first place, where one who hath no right of computs his cattle into the land; and thereby robs the of the commoners of their respective shares of the re. Or if one, who hath a right of common, puts in which are not commonable, as hogs and goats; which ints to the same inconvenience. But the lord of the soil (by custom or prescription, but not without) put a er's cattle into the common (c); and also, by a like iption for common appurtenant, cattle that are not nonable may be put into the common (d). The lord fthe foil may justify making burrows therein, and putn rabbets, fo as they do not encrease to so large a numstotally to destroy the common (e). But in general, in he beafts of a stranger, or the uncommonable cattle of moner, be found upon the land, the lord or any of ommoners may distrein them damage-feasant (f): or ommoner may bring an action on the case to recover ges, provided the injury done be any thing confiderable; at he may lay his action with a per quod, or allege bereby he was deprived of his common. But for a trirespass the commoner has no action, but the lord of the nly, for the entry and trespass committed (g).

NOTHER disturbance of common is by furcharging it; or ag more cattle therein than the pasture and herbage will a, or the party hath a right to do. In this case he that sures does an injury to the rest of the owners, by depriving of their respective portions, or at least contracting them

Cro. Eliz. 558. (c) 1 Roll. Abr. 396. (d) Co. Litt. (e) Cro. Eliz. 876. Cro. Jac. 195. Lutw. 108. (f) 9

F

fa

m

ion 8.

eth

n, he

tle is

dt

e tl

8 01

ond

feit

ag

any

cee

ion

to

eve

n) I

into a smaller compass. This injury by surcharging can perly speaking only happen, where the common is appear or appurtenant (h), and of course limitable by law; or we when in gross, it is expressly limited and certain: for a man hath common in gross, sans nombre or without he cannot be a surcharger. However, even where a me said to have common without stint, still there must be sufficient for the lord's own beasts (i): for the law will suppose that, at the original grant of the common, the meant to exclude himself.

THE usual remedies, for surcharging the common, a ther by distreining so many of the beasts as are above number allowed, or else by an action of trespals; which may be had by the lord: or, laftly, by a specia tion on the case for damages; in which any commoner be plaintiff (k). But the antient and most effectual me of proceeding is by writ of admeasurement of passure. lies, either where a common appurtenant or in groß is tain as to number, or where a man has common apper or appurtenant to his land, the quantity of which com has never yet been ascertained. In either of these cales well the lord, as any of the commoners, is entitled to writ of admeasurement: which is one of those writs, that called vicontiel(1), being directed to the sheriff, (vice-on and not to be returned to any fuperior court, till finally cuted by him. It recites a complaint, that the defen hath furcharged, superoneravit, the common: and ther commands the sheriff to admeasure and apportion it; the defendant may not have more than belongs to him, that the plaintiff may have his rightful share. And upon fuit all the commoners shall be admeasured, as well who have not, as those who have, furcharged the comm as well the plaintiff, as the defendant (m). The exect of this writ must be by a jury of twelve men, who are

⁽h) See book II. ch. 3. (i) 1 Roll Abr. 399. Freem. 273. (l) 2 Inft. 369. Finch. L. 314. (m) P. 125.

rv

ut

wil

ove

ecia

ner

me

is

pen

com

ases

to

tha

-con

lly

efen

hen

t;

im,

200

11

mn

cect

rel

11

cir oaths to ascertain, under the superintendence of the rist, what and how many cattle each commoner is entitled seed. And the rule for this admeasurement is generally derstood to be, that the commoner shall not turn more the upon the common, than are sufficient to manure and ok the land to which his right of common is annexed; or, our antient law expressed it, such cattle only as are levant incouchant upon his tenement (n): which being a thing untain before admeasurement, has frequently, though errously, occasioned this unmeasured right of common to be led a common without shint or sans nombre (0); a thing ich, though possible in law, does in fact very rarely the

If, after the admeasurement has thus ascertained the right. ame defendant furcharges the common again, the plainmay have a writ of second surcharge, de secunda superoneime, which is given by the statute West. 2. 13 Edw. I. and thereby the sheriff is directed to enquire by a jury, ther the defendant has in fact again furcharged the comn, contrary to the tenor of the last admeasurement: and he has, he shall then forfeit to the king the supernumerary the put in, and also shall pay damages to the plaintiff (p). is process seems highly equitable: for the first offence is to be committed through mere inadvertence; and therethere are no damages or forfeiture on the first writ, which only to ascertain the right which was disputed : but the and offence is a wilful contempt and injustice; and therepunished very properly with not only damages, but also feiture. And herein the right, being once settled, is neagain disputed; but only the fact is tried, whether there my second surcharge or no: which gives this neglected ceeding a great advantage over the modern method, by on on the case, wherein the quantum of common belongto the defendant must be proved upon every fresh trial, every repeated offence.

THERE

n) Bro. Abr. t. prescription. 28. (o) Hardr. 117. (p) F. N. 146. 2 Inst. 370.

E

d,

lef

G

act

nfe one ran

Ш

fin

hen

oun oth

can

odio

nexe

it is

ed i

us ob

xed t

THERE is yet another disturbance of common, when owner of the land, or other person, so encloses or other obstructs it, that the commoner is precluded from enjoy the benefit, to which he is by law intitled. This may done, either by erecting fences, or by driving the cattle the land, or by ploughing up the foil of the common (Or it may be done by erecting a warren therein, and for ing it with rabbets in fuch quantities, that they devour whole herbage, and thereby destroy the common. For fuch case, though the commoner may not destroy the rabbe yet the law looks upon this as an injurious disturbance of right, and has given him his remedy by action against owner (r). This kind of diffurbance does indeed amount a diffeifin, and if the commoner chooses to consider it in light, the law has given him an affife of novel diffeifin, aga the lord, to recover the possession of his common (s). it has given a writ of quod permittat, against any stranger, well as the owner of the land, in case of such a disturba to the plaintiff as amounts to a total deprivation of his or mon; whereby the defendant shall be compelled to per the plaintiff as amounts to a total deprivation of his men ; whereby the defendant shall be compelled to pr the plaintiff to enjoy his common as he ought (t). Butif commoner does not choose to bring a real action to reco feifin, or to try the right, he may (which is the easier more usual way) bring an action on the case for his damag instead of an affise or a quod permittat (u).

THERE are cases indeed, in which the lord may end and abridge the common; for which, as they are no inj to any one, so no one is entitled to any remedy. For i provided by the statute of Merton, 20 Hen. III. c. 4. the lord may approve, that is, enclose and convert to uses of husbandry (which is a melioration or approvement any waste grounds, woods, or pastures, in which his tend have common appendant to their estates; provided he leas sufficient

⁽q) Cro. Eliz. 198. (r) Cro. Jac. 195. (s) F. N. B. (t) Finch. L. 275. F. N. B. 123. (u) Cro Jac. 195.

I

ay

to

ur

or

bbe

of

uft

unt

nt

agai

.

er,

rba

s co

per

-

tif

reco

ier a

mag

encl

ini

or i

to

eme

tena

lea

ffici

B. 1

ficient common to his tenants, according to the proportion their land. And this is extremely reasonable : for it old be very hard if the lord, whose ancestors granted out te estates to which the commons are appendant, should precluded from making what advantage he can of the reft his mahor; provided fuch advantage and improvement be way derogatory from the former grants. The statute leftm. 2. 13 Edw. I. c. 46. extends this liberty of approv-, in like manner, against all others that have common purtenant, or in gross, as well as against the tenants of the d, who have their common appendant; and farther enacts. at no affife of novel diffeifin, for common, shall lie against ord for erecting on the common any windmill, sheepule, or other necessary buildings therein specified: which. Edward Coke fays (w), are only put as examples; and at any other necessary improvements may be made by the d, though in reality they abridge the common, and make less sufficient for the commoners. And lastly, by statutes Geo. II. c. 36. and 31 Geo. II. c. 41. it is particularly afted, that any lords of wastes and commons, with the nient of the major part, in number and value, of the commers, may inclose any part thereof for the growth of timrand underwood.

III. The third species of disturbance, that of ways, is vesimilar in its nature to the last: it principally happening
then a person, who hath a right to a way over another's
bunds, by grant or prescription, is obstructed by inclosures,
other obstacles, or by ploughing across it; by which means
cannot enjoy his right of way, or at least not in so comodious a manner as he might have done. If this be a way
nexed to his estate, and the obstruction is made by the tent of the land, this brings it to another species of injury;
it is then a nusance, for which an assise will lie, as mentied in a former chapter (x). But if the right of way,
as obstructed by the tenant, be only in gross, (that is, anaced to a man's person and unconnected with any lands or
Vol., III.

⁽w) 2 Jaft. 476.

d) Ifo

i

ut

ntr

nly

refe

ing

blo.

on.

atro

urir

ecar

he r

ight

or th

g w

herei t the

aust

hich

or,

Co.

tenements) or if the obstruction of a way belonging to house or land is made by a stranger, it is then in either a merely a disturbance: for the obstruction of a way in gross no detriment to any lands or tenements, and therefore do not fall under the legal notion of a nusance, which must laid ad nocumentum liberi tenementi (y); and the obstruction of it by a stranger can never tend to put the right of we in dispute: the remedy therefore for these disturbances is no by assise or any real action, but by the universal remedy action on the case to recover damages (z).

IV. The fourth species of disturbance is that of disturbance of tenure, or breaking that connexion which such between the lord and his tenant, and to which the law passed fo high a regard, that it will not suffer it to be wantonly it solved by the act of a third person. The having an estawell tenanted is an advantage that every landlord must very sensible of; and therefore the driving away a tenastrom off his estate is an injury of no small consequence. therefore there be a tenant at will of any lands or tenement and a stranger either by menaces and threats, or by unlaws distresses, or by fraud and circumvention, or other mean contrives to draw him away, or inveigle him to leave his nancy, this the law very justly construes to be a wrong a injury to the lord (a), and gives him a reparation in damage against the offender by a special action on the case.

V. THE fifth and last species of disturbance, but by far most considerable, is that of disturbance of patronage; whi is an hindrance or obstruction of a patron to present his de to a benefice.

This injury was diftinguished at common law from and species of injury, called usurpation; which is an absolute out or dispossession of the patron, and happens when a stranger, that has no right, presenteth a clerk, and he is thereupon admit

⁽y) F. N. B. 183. (z) Hale on F. N. B. 183. Lutw. 111. (2) Hal. Anal. c. 40, 1 Roll, Abr. 108,

I

ca do At

sn

y

tur

bfi

y d

esta ust

ena

en

awi Méar

is

ga

mag

far

whi

cle

not

ou

r, t

mit

1,1

nd instituted (b). In which case, of asurpation, the patron of by the common law not only his turn of presenting pro at vice, but also the absolute and perpetual inheritance of he advowson, so that he could not present again upon the ext avoidance, unless in the mean time he recovered his ight by a real action, viz. a writ of right of advowson (c). the reason given for his losing the present turn, and not ecting the usurper's clerk, was, that the final intent of the w in creating this species of property being to have a fit erson to celebrate divine service, it preferred the peace of he church (provided a clerk were once admitted and inftitutd) to the right of any patron whatever. And the patron lo lost the inheritance of his advowson, unless he recovered in a writ of right, because by fuch usurpation he was put ut of possession of his advowson, as much as when by actual ntry and oufter he is diffeifed of lands or houfes; fince the plypoffession, of which an advowson is capable, is by actual refentation and admission of one's clerk. And therefore, then the clerk was once instituted (except in the case of the ing, where he must also be indicted) (d), the church was bolutely full; and the usurper became seised of the advowm. Which seisin or possession it was impossible for the true atron to remove by any possessory action, or other means, uring the plenarty or fullness of the church; and when it ecame void afresh, he could not present, since another had he right of possession. The only remedy therefore, which epatron had left, was to try the mere right in a writ of ight of advowson; which is a peculiar writ of right, framed or this special purpose, but in every other respect correspondgwith other writs of right (e): and, if a man recovered lerein, he regained his advowson, and was entitled to present the next avoidance (f). But in order to fuch recovery he uft allege a presentation in himself or some of his ancestors, hich proves him or them to have been once in possession: or, as a grant of the advowson, during the fullness of the

Co. Litt. 277. (c) 6 Rep. 49. (d) Ibid. (e) F. N. B. (f) Ibid. 36.

in

nA

I he

rel

her

ne p

imr iat

ff ci

ordi

ie t

hof

age

his

An

e pa

offeff

s he

icte red

or to

rion

ood)

church, conveys no manner of possession for the present therefore a purchaser, until he hath presented, hath no actual feisin whereon to ground a writ of right (g). Thus stood the common law.

But bishops, in antient times, either by carelesiness or co lufion, frequently instituting clerks upon the presentation usurpers, and thereby defrauding the real patrons of the right of possession, it was in substance enacted by status Westm. 2. 13 Edw. I. c. 5. §. 2. that if a possessory actions brought within fix months, after the avoidance, the patro shall (notwithstanding such usurpation and institution) reco ver that very presentation; which gives back to him the self of the advowson. Yet still, if the true patron omitted bring his action within fix months, the feifin was gained b the usurper, and the patron to recover it was driven to the long and hazardous process of a writ of right. To remed which it was farther enacted by statute 7 Ann. c. 18. thatn usurpation shall displace the estate or interest of the patron or turn it to a mere right; but that the true patron may pre fent upon the next avoidance, as if no fuch usurpation ha happened. So that the title of usurpation is now much na rowed, and the law stands upon this reasonable foundation that if a stranger usurps my presentation, and I do not put fue my right within fix months, I shall lose that turn with out remedy, for the peace of the church, and as a punit ment for my own negligence; but that turn is the only or I shall lose thereby. Usurpation now gains no right to the usurper, with regard to any future avoidance, but only the present vacancy: it cannot indeed be remedied after if months are past; but, during those fix months, it is only species of disturbance.

DISTURBERS of a right of advowson may therefore these three persons; the pseudo-patron, his clerk, and the odinary: the pretended patron, by presenting to a church which he has no right, and thereby making it litigious or diputable; the clerk, by demanding or obtaining institution which

col

0.0

tut

nb

tro

eco

eifi

d b

o th

ned

at n

tron

pre

ha

nar

ion

pu

vith

nish

y or

o th

ly t

er f

nly

ore l

ne o

rch

or di ution which which tends to and promotes the same inconvenience; and the ordinary, by refusing to admit the real patron's clerk, or admitting the clerk of the pretender. These disturbances are exatious and injurious to him who hath the right: and therefore, if he be not wanting to himself, the law (besides the mit of right of adowson, which is a final and conclusive renedy) hath given him two inferior possessory actions for his elies; an affise of darrein presentment, and a writ of quare impedit; in which the patron is always the plaintist, and not he clerk. For the law supposes the injury to be offered to im only, by obstructing or refusing the admission of his notinee: and not to the clerk, who hath no right in him till institution, and of course can suffer no injury.

1. An affise of darrein presentment, or last presentation, lies then a man, or his ancestors, under whom he claims, have refented a clerk to a benefice, who is instituted; and afterards upon the next avoidance a stranger presents a clerk, and ereby disturbs him that is the real patron. In which case epatron shall have this writ (h), directed to the sheriff to mmon an affise or jury, to inquire who was the last patron at presented to the church now vacant, of which the plainfcomplains that he is deforced by the defendant: and, acording as the affife determines that question, a writ shall ifto the bishop, to institute the clerk of that patron, in hose favour the determination is made, and also to give daages, in pursuance of statute Westm. 2. 13 Edw. I. c. 5. his question, it is to be observed, was before the statute Ann. before-mentioned, entirely conclusive, as between epatron or his heirs and a stranger: for, till then, the full Mession of the advowson was in him who presented last, and sheirs; unless, fince that presentation, the clerk had been icted within fix months, or the rightful patron had recored the advowson in a writ of right, which is a title supeor to all others. But that statute having given a right to any tion to bring a quare impedit, and to recover (if his title be od) notwithstanding the last presentation, by whomsoever

roi

if

ga o b

I

our

or,

er! gai

d

rife

t t

e ar

is c

gain gain

gain

ot d

ut,

de

rollo

fect.

the

(p)

(s) I

made; affises of darrein presentment, now not being in an wise conclusive, have been totally disused, as indeed they be gan to be before; a quare impedit being a more general, an therefore a more usual action. For the affise of darrein presentment lies only where a man has an advowson by descent from his ancestors; but the writ of quare impedit is equal remedial whether a man claims title by descent or by pur chase (i).

2. I PROCEED therefore, secondly, to inquire into the nature (k) of a writ of quare impedit, now the only action used in case of the disturbance of patronage: and shall for premise the usual proceedings previous to the bringing of the writ.

UPON the vacancy of a living the patron, we know, bound to present within fix calendar months (1), otherwise will lapse to the bishop. But, if the presentation be made within that time, the bishop is bound to admit and institu the clerk, if found sufficient (m); unless the church be ful or there be notice of any litigation. For if any opposition intended; it is usual for each party to enter a caveat with t bishop, to prevent his institution of his antagonist's cler An institution after a caveat entered is void by the ecclesiant cal law (n); but this the temporal courts pay no regard t and look upon a caveat as a mere nullity (o). But if two pr fentations be offered to the bishop upon the same avoidant the church is then faid to become litigious; and, if nothing farther be done, the bishop may suspend the admission of ther, and fuffer a lapse to incur. Yet if the patron or cle on either side request him to award a jus patronatus, he bound to do it. A jus patronatus is a commission from the fhop, directed usually to his chancellor and others of compete learning, who are to fummon a jury of fix clergymen and laymen, to inquire into and examine who is the rightful p

⁽i) 2 Inst. 355. (k) See Boswell's case. 6 Rep. 48 (l) book II. ch. 18. (m) See book I. ch. 11. (n) 1 Burn. 46 (o) 1 Roll. Rep. 191.

cen

th

tio

ft

W,

vise

mad litu

ful

on

h t

eler

fiaft

rd t

o pr

land

thin

of e

cle

he

thel

pete

nd l

tr

(1) \$

n. 2

atron (p); and if, upon fuch enquiry made and certificate hereof returned by the commissioners, he admits and institutes the clerk of that patron whom they return as the true ne, the bishop secures himself at all events from being a dimber, whatever proceedings may be had afterwards in the emporal courts.

THE clerk refused by the bishop may also have a remedy gainst him in the spiritual court, denominated a duplex queta (q): which is a complaint in the nature of an appeal som the ordinary to his next immediate superior; as from a sishop to the arch-bishop, or from an arch-bishop to the degates; and if the superior court adjudges the cause of refusal to be insufficient, it will grant institution to the appellant.

Thus far matters may go on in the mere ecclefiaftical ourse; but in contested presentations they seldom go so far: n, upon the first delay or refusal of the bishop to admit his erk, the patron usually brings his writ of quare impedit gainst the bishop, for the temporal injury done his property, disturbing him in his presentation. And, if the delay ises from the bishop alone, as upon pretence of incapacity, the like, then he only is named in the writ; but if there canother presentation set up, then the pretended patron and sclerk are also joined in the action; or it may be brought ainst the patron and clerk, leaving out the bishop; or rainst the patron only. But it is most adviseable to bring it rainst all three: for if the bishop be left out, and the suit be ot determined till the fix months are past, the bishop is ented to present by lapse; for he is not party to the suit (r): ut, if he be named, no lapse can possibly accrue till the right determined. If the patron be left out, and the writ be bught only against the bishop and the clerk, the suit is of no feet, and the writ shall abate (s); for the right of the patron the principal question in the cause (t). If the clerk be left out, L4 and

⁽p) 1 Burn. 16, 17. (q) Ibid. 113. (r) Cro. Jac. 98. (s) Hob. 316. (t) 7 Rep, 25.

pp

I

et n l

he i

di

ifh

ne

ente

And he o

idg

or t

e er

hol

on,

0

ama

Veft

rca

e ti

ithi

la

ena

oug

ive

mm

IF

ence

(2)

and has received institution before the action brought (as i fometimes the case) the patron by this suit may recover hi right of patronage, but not the present turn; for he canno have judgment to remove the clerk, unless he be made a de fendant, and party to the suit, to hear what he can alleg against it. For which reason it is the safer way always to in fert them, all three, in the writ.

THE writ of quare impedit (u) commands the disturbers the bishop, the pseudo-patron, and his clerk, to permit the plaintiff to present a proper person (without specifying the particular clerk) to such a vacant church, which pertains the his patronage; and which the defendants, as he alleges, do obstruct: and unless they so do, then that they appear in cour to shew the reason why they hinder him.

IMMEDIATELY on the fuing out of the quare impedia, the plaintiff suspects that the bishop will admit the defendant or any other clerk, pending the fuit, he may have a prohib tory writ, called a ne admittas (w); which recites the conten tion begun in the king's courts, and forbids the bishop to admi any clerk whatfoever till fuch contention be determined. An if the bishop doth, after the receipt of this writ, admit an person, even though the patron's right may have been foun in a jure patronatus, then the plaintiff, after he has obtained judgment in the quare impedit, may remove the incumbent if the clerk of a stranger, by writ of scire facias (x): an shall have a special action against the bishop, called a quant incumbra vit; to recover the presentation, and also satisfaction in damages for the injury done him by incumbering the church with a clerk, pending the fuit, and after the man mittas received (y). But if the bishop has incumbered the church by instituting the clerk, before the ne admittas issue no quare incumbravit lies; for the bishop hath no leg notice, till the writ of ne admittas is ferved upon him. Th patro

⁽u) F. N. B. 32. (w) Ibid. 37. (x) 2 Sd. 94. (y) P. N. B. 48.

ur

.

ibi

ten

m

An

an

un

ne

ent

an

tio

th

al

ued ega

Th

110

matron is therefore left to his quare impedit merely; which, as was before observed, now lies (fince the statute of Westm. 2.) is well upon a recent usurpation within six months past, as upon a disturbance without any usurpation had.

In the proceedings upon a quare impedit, the plaintiff must tout his title at length, and prove at least one presentation himself, his ancestors, or those under whom he claims; for e must recover by the strength of his own right, and not by he weakness of the defendant's (z): and he must also shew disturbance before the action brought (a). Upon this the shop and the clerk usually disclaim all title: fave only, the ne as ordinary, to admit and institute; and the other as premtee of the patron, who is left to defend his own right. and, upon failure of the plaintiff in making out his own title, e defendant is put upon the proof of his, in order to obtain adgment for himself, if needful. But if the right be found or the plaintiff, on the trial, three farther points are also to enquired: 1. If the church be full; and, if full, then of hose presentation: for if it be of the defendant's presentaon, then the clerk is removeable by writ brought in due time. Of what value the living is: and this in order to affels the mages which are directed to be given by the statute of Veftm. 2. 3. In case of plenarty upon an usurpation, whether scalendar (b) months have passed between the avoidance and time of bringing the action: for then it would not be thin the statute, which permits an usurpation to be devested a quare impedit, brought infra tempus semestre. So that enarty is still a sufficient bar in an action of quare impedit, ought above fix months after the vacancy happens; as it was iverfally by the common law, however early the action was mmenced.

Is it be found that the plaintiff hath the right, and hath comthreed his action in due time, then he shall have judgment to L 5

⁽²⁾ Vaugh. 7, 8. (a) Hob. 199. (b) 2 Inst. 36c.

de

im

nui

adn fixt

I

actio

darr

not i

of fe

lenta cour

as of

ofu

accor

to th

by th

of pr

quare

to by

(g)

vas a h) St

4. 11

recover the presentation; and, if the church be full by infi tution of any clerk, to remove him: unless it were file bendente lite by lapfe to the ordinary, he not being party toth fuit; in which case the plaintiff loses his presentation pro he vice, but shall recover two years full value of the church from the defendant the pretended patron, as a fatisfaction forth turn loft by his disturbance: or, in case of his insolvency, h shall be imprisoned for two years (c). But if the church me mains still void at the end of the fuit, then whichever part the presentation is found to belong to, whether plaintiff ord fendant, shall have a writ directed to the bishop ad admitta dum clericum (d), reciting the judgment of the court, ando dering him to admit and institute the clerk of the prevails party; and, if upon this order he does not admit him, if patron may fue the bishop in a writ of quare non admist (e and recover ample fatisfaction in damages.

Besides these possessions, there may be also had (hath before been incidentally mentioned) a writ of right advocwson, which resembles other writs of right: the on distinguishing advantage now attending it, being, that it more conclusive than a quare impedit; since to an action quare impedit a recovery had in a writ of right may be pleated in bar.

There is no limitation with regard to the time with which any actions touching advowsons are to be brought; least none later than the times of Richard I. and Henry I for by statute 1 Mar. st. 2. c. 5. the statute of limitation 32 Hen. VIII. c. 2. is declared not to extend to any with right of advowson, quare impedit, or assiste of darrein prefament, or jus patronatus. And this upon very good reason because it may very easily happen that the title to an avowson may not come in question, nor the right have portunity to be tried, within sixty years: which is the long period of limitation assigned by the statute of Henry VIII. I fir Edward Coke (f) tells us, that there was a person of one

(d) F. N.

⁽c) Stat. Westm. 2. 13 Edw. L c. 5. §. 3. 38. (e) Ilid. 47. (f) 1 Inst. 115.

art

tter

10

ilin

, ti

(e)

d (

on

it

on

lea

ıt;

y II

tion

vrit

refer

afo

in i

e

ong

one

N

his churches, that had been incumbent there about fifty years; nor are instances wanting wherein two successive incumbents have continued for upwards of a hundred years (g). Had herefore the last of these incumbents been the clerk of a usurper, or had been presented by lapse, it would have beeen nereflary and unavoidable for the patron, in case of a dispute, to have recurred back above a century, in order to have shewn a clear title and seisin by presentation and admission of the prior neumbent. But though, for these reasons, a limitation is highly improper with respect only to the length of time; yet, as the title of advowsons is, for want of some limitation, rendered more precarious than that of any other hereditament, it might not perhaps be amiss if a limitation were established with respect to the number of avoidances; or, rather, if a imitation were compounded of thel ength of time and the number of avoidances together: for instance, if no seisin were admitted to be alleged in any of these writs of patronage, after fixty years and three avoidances were past.

In a writ of quare impedit, which is almost the only real action that remains in common use, and also in the assise of farrein presentment, and a writ of right, the patron only, and not the clerk, is allowed to fue the disturber. But, by virtue of several acts of parliament (h), there is one species of preentations, in which a remedy, to be fued in the temporal courts, is put into the hands of the clerks presented, as well as of the owners of the advowson. I mean the presentation bluch benefices, as belong to roman catholic patrons; which, according to their feveral counties, are vested in and secured the two universities of this kingdom. And particularly by the statute of 12 Ann. st. 2. c. 14. §. 4. a new method of proceeding is provided; viz. that, besides the writs of mare impedit, which the univerfities as patrons are entitled bring, they, or their clerks, may be at liberty to file a bill

⁽g) The two last incumbents of the rectory of Chelsfield cum famborough in Kent, continued 101 years; of whom the former was admitted in 1650, the latter in 1700, and died in 1751. h) Stat. 3 Jac. I c. 5. 1 W. & M. c. 26. 12 Ann. st. 2. c. 4 11 Geo. II. c. 17.

Book III bill in equity against any person presenting to such livings, and disturbing their right of patronage, or his ceftui que trust, or any other person whom they have cause to suspect; in order to compel a discovery of any secret trusts, for the benefit of papifts, in evalion of those laws whereby this right of advowson is vested in those learned bodies: and also (by the flatute 11 Geo. II.) to compel a discovery whether any gran or conveyance, faid to be made of fuch advowfon, were made bona fide to a protestant purchaser, for the benefit of protestants, and for a full consideration; without which requifites every fuch grant or conveyance of any advowion of avoidance is absolutely null and void. This is a particular la and calculated for a particular purpose: but in no inflance but this does the common law permit the clerk himfelf to interfere in recovering a presentation, of which he is afterward to have the advantage. For besides that he has (as was before observed) no temporal right in him till after institution and induction: and, as he therefore can fuffer no wrong, is con fequently entitled to no remedy; this exclusion of the clerk from being plaintiff feems also to arise from the very great honour and regard which the law pays to his facred function For it looks upon the cure of fouls as too arduous and important a talk to be eagerly fought for by any ferious clergyman and therefore will not permit him to contend openly at law for a charge and truft, which it prefumes he undertakes with diffidence.

r ec.

se,

nor

ent rin

(k

But when the clerk is in full possession of the benefice the law gives him the same possessory remedies to recover his glebe, his rents, his tithes, and other ecclefiaftical dues by writ of entry, affise, ejectment, debt, or trespass, (a the case may happen) which it furnishes to the owners of lay property. Yet he shall not have a writ of right nor fuch other fimilar writs as are grounded upon the mere right; because he hath not in him the intire fee and right (i): but he is entitled to a special remedy called a win of juris utrum, which is fometimes styled the parson's wi

m

ind

0

ad-

the

and add

wi.

or law

in-

urd

OF

and

erk

real

on

ooran; law

fright (k), being the highest writ which he can have (1). This lies for a parson or a prebendary at common law, and or a vicar by statute 14 Edw. III. c. 17. and is in the nature fan affise, to enquire whether the tenements in question are rankalmoign belonging to the church of the demandant, or We the lay fee of the tenant (m). And thereby the demandant may recover lands and tenements belonging to the church. hich were aliened by the predecessor; or of which he was iffeifed; or which were recovered against him by verdict. onfession, or default, without praying in aid of the patron ad ordinary; or on which any person has intruded since the redecessor's death (n). But since the restraining statute of Eliz. c. 10. whereby the alienation of the predecessor, or recovery fuffered by him of the lands of the church, is eclared to be absolutely void, this remedy is of very little k, unless where the parson himself has been deforced for we than twenty years (o); for the fuccessor, at any compeent time after his accession to the benefice, may enter, or ring an ejectment.

(k) Booth. 221.

(1) F. N. B 48. (o) Booth 221, (m) Registr. 32.

nan vith

on,

isputedrical of co

T

hat

iate

nan

app felf

nfri

oya

o ca

nife

f)

f th

ng

ight

with

n m

f th

ndu

(c)

CHAPTER THE SEVENTEENTH.

OF INJURIES PROCEEDING FROM, OR AFFECTING THE CROWN.

HAVING in the nine preceding chapters confidered to injuries or private wrongs that may be offered one subject to another, all of which are redressed by the con mand and authority of the king, fignified by his origin writs returnable in his feveral courts of justice, which then derive a jurisdiction of examining and determining the cor plaint; I proceed now to inquire of the mode of redreffin these injuries to which the crown itself is a party: which is juries are either where the crown is the aggressor, and whi therefore cannot without a folecism admit of the same kind remedy (a); or else is the sufferer, and which then are usual remedied by peculiar forms of process, appropriated to t royal prerogative. In treating therefore of those, we w consider first, the manner of redressing those wrongs or in ries which a subject may suffer from the crown; and then redreffing those which the crown may receive from a subject

I. THAT the king can do no wrong, is a necessary and surdamental principle of the English constitution: meaning on as has formerly been observed (b), that, in the first place, what wer may be amiss in the conduct of public affairs is not chargeab personal

⁽a) Bro. Abr. t. petition, 12. 1. prerogative, 2. (b) Book ch. 7. pag. 243-246

l t

con

en

on

ffir

ni

hi

nd

ial

n the wind

jed

fu

ersonally on the king; nor is he, but his ministers, accountble for it to the people: and, secondly, that the prerogative
sthe crown extends not to do any injury; for, being created
or the benefit of the people, it cannot be exerted to their
rejudice (c). Whenever therefore it happens, that, by misformation or inadvertence, the crown hath been induced to
avade the private rights of any of his subjects, though no
stion will lie against the sovereign (d), (for who shall comand the king?) (e) yet the law hath furnished the subject
with a decent and respectful mode of removing that invaon, by informing the king of the true state of the matter in
sispute: and, as it presumes that to know of an injury and to
sures; it are inseparable in the royal breast, it then issues as
stourse, in the king's own name, his orders to his judges to
significe to the party aggrieved.

THE distance between the sovereign and his subjects is such, hat it rarely can happen, that any personal injury can immelately and directly proceed from the prince to any private nan: and, as it can fo feldom happen, the law in decency upposes that it never will or can happen at all; because it feels felf incapable of furnishing any adequate remedy, without fringing the dignity and destroying the sovereignty of the oyal person, by setting up some superior power with authority call him to account. The inconveniency therefore of a nichief that is barely possible, is (as Mr Locke has observed) f) well recompensed by the peace of the public and security f the government, in the person of the chief magistrate beng fet out of the reach of coercion. But injuries to the ights of property can scarcely be committed by the crown ithout the intervention of its officers; for whom the law matter of right entertains no respect or delicacy, but furishes various methods of detecting the errors or misconduct fthose agents, by whom, the king has been deceived, and nduced to do a temporary injustice.

THI

⁽c) Plowd. 487. (d) Jenkins, 78. (e) Finch. L. 83. (f) On Gov. p. 2. §. 205.

ed ry gain nor gis air

a

eds

ans

II.

ay

I.

ith

r

offe

n n

ain

ing

ain

ofe

ng

eafe

vay

jur

ua

(n)

pr

THE common law methods of obtaining poffession or re stitution from the crown, of either real or personal property are, 1. By petition de droit, or petition of right, which faid to owe its original to king Edward the first (g). 2. B monstrans de droit, manifestation or plea of right: both which may be preferred or prosecuted either in the chancer or exchequer (h). The former is of use, where the king in full possession of the hereditaments or chattels, and the part fuggests such a right as controverts the title of the crow grounded on facts disclosed in the petition itself; in which case he must be careful to state truly the whole title of the crown, otherwise the petition shall abate (i): and then, upo this answer being endorsed or underwritten by the king in droit fait al partie (let right be done to the party) (i) a com mission shall issue to inquire of the truth of this suggestion (k): after the return of which, the king's attorney is at li berty to plead in bar; and the merits shall be determined upon iffue or demurrer, as in fuits between subject and subject Thus, if a diffeifor of lands, which are holden of the crown dies feised without any heir, whereby the king is prima fact entitled to the lands, and the possession is cast on him eithe by inquest of office, or by act of law without any office found now the diffeifee shall have remedy by petition of right, sug gesting the title of the crown, and his own superior right be fore the diffeifin made (1). But where the right of the part as well as the right of the crown, appears upon record, ther the party shall have monstrans de droit, which is putting in claim of right grounded on facts already acknowledged and established, and praying the judgment of the court, whether upon those facts the king or the subject hath the right. As if in the case before supposed, the whole special matter is foun by an inquest of office, (as well the diffeisin, as the dying without any heir) the party grieved shall have monstrans de drei at the common law (m). But as this feldom happens, and

⁽g) Bro. Abr. t. prerog. 2. Fitzh, Abr. t. error, 8. [h] Skin. 609. (i) Finch. L. 256. (j) State Tr. vii. 134 (k) Skin. 608. Rast. Entr. 461. (l) Bro. Abr. t. petitum 20. 4 Rep. 58. (m) 4 Rep. 55.

II

. Le

ert,

.B

h d

cer

ng

part

OWI

hic

fth

100

, for

om

ftio

t li

ipoi ject

WI

faci

ind

fug

be

uty

her

in

and

the

s if

un

ing

roi

and

the

(h)

34

1011

eremedy by petition was extremely tedious and expensive, atby monstrans was much enlarged and rendered almost unirial by feveral statutes, particularly 36 Edw. III. c. 13. d 2 & 3 Edw. VI. c. 8. which also allow inquisitions of he to be traversed or denied, wherever the right of a subtis concerned, except in a very few cases (n). These proedings are had in the petty bag office in the court of chanry: and, if upon either of them the right be determined ainst the crown, the judgment is, quod manus domini regis mueantur et possessio restituatur petenti, salvo jure domini vis (0); which last clause is always added to judgments ainst the king (p), to whom no laches is ever imputed, and hose right (till some late statutes) (q) was never deseated any limitation or length of time. And by fuch judgment crown is instantly out of possession (r); so that there eds not the indecent interpolition of his own officers to usfer the seisin from the king to the party aggrieved.

II. THE methods of redressing such injuries as the crown as receive from a subject, are,

in By such usual common law actions, as are consistent in the royal prerogative and dignity. As therefore the king, a reason of his legal ubiquity, cannot be disseised or dissessed of any real property which is once vested in him, he is maintain no action which supposes a dispossession of the aintist; such as an assiste or an ejectment (s): but he may sing a quare impedit (t), which always supposes the comainant to be seised or possessed of the advowson: and he may offecute this writ, as well as every other, as well in the sig's bench as the common pleas, or in whatever court he eases. So too he may bring an action of trespass for taking way his goods; but not for breaking his close, or any other jury done upon his soil or possession (v). It would be sually tedious and difficult, to run through every minute distinction

⁽n) Skin. 608. (o) 2 Inst. 695. Rast. Entr. 463. (p) Finch. 460. (q) 21 Jac. I. c. 2. 9 Geo. III. c. 16. (r) Ibid 459. Bro. Abr. t. prerogative 89. (t) F. N. B. 32. (v) Bro. Abr. prerog. 130. F. N. B. 90.

d nic neff

ch

W

T

ent

con

urt ngl

ng re

nd rt l

6.

nd t

uer itio

nd j

nd

E

distinction that might be gleaned from our antient books wi regard to this matter; nor is it in any degree necessary, much easier and more effectual remedies are usually obtain by such prerogative modes of process, as are peculiarly co fined to the crown.

2. SUCH is that of inquisition or inquest of office : which an inquiry made by the king's officer, his sheriff, coroner, escheator, virtute officii, or by writ to them sent for that pu pose, or by commissioners especially appointed, concerni any matter that entitles the king to the possession of lands tenements, goods or chattels (u). This is done by a juryof determinate number; being either twelve, or less, or no As, to enquire, whether the king's tenant for life died felle whereby the reversion accrues to the king: whether A, w held immediately of the crown, died without heirs; in whi case the lands belong to the king by escheat: whether B attainted of treason; whereby his estate is forfeited to crown: whether C, who has purchased lands, be an alien which is another cause of forfeiture: whether D be an id a nativitate; and therefore, together with his lands, appe tains to the custody of the king: and other questions of li import, concerning both the circumstances of the tenant, a the value or identity of the lands. These inquests of off were more frequently in practice than at present, during t continuance of the military tenures amongst us: when, up the death of every one of the king's tenants, an inquest office was held, called an inquisitio post mortem, to enquire what lands he died feised, who was his heir, and of what a in order to entitle the king to his marriage, wardship, relie primer-seisin, or other advantages, as the circumstances the case might turn out. To superintend and regulate the enquiries the court of wards and liveries was instituted statute 32 Hen. VIII. c. 46. which was abolished at the rest ration of king Charles the fecond, together with the oppress tenures upon which it was founded. WIT

K II

s wi

у,

tain

CO

nich

er,

t pu

erni

nds

of

mor

felfe

, whi

·B

to t

lier

id

ppe

li

, ar

offi

gt

upo

eft

ire

S

the

dl

WITH regard to other matters, the inquests of office still main in force, and are taken upon proper occasions; being tended not only to lands, but also to goods and chattels persal, as in the case of wreck, treasure-trove, and the like; despecially as to forfeiture for offences. For every jury nich tries a man for treason or felony, every coroner's inset that sits upon a felo de se, or one killed by chancemed, is, not only with regard to chattels, but also as to real terests, in all respects an inquest of office: and if they find a treason or felony, or even the slight of the party accused hough innocent) the king is thereupon, by virtue of this office and, entitled to have his forfeitures; and also, in the case chancemedley, he or his grantees are entitled to such things, way of deodand, as have moved to the death of the party.

THESE inquests of office were devised by law, as an auentic means to give the king his right by folemn matter of ord; without which he in general can neither take, nor tt from, any thing (w). For it is a part of the liberties of igland, and greatly for the fafety of the fubject, that the ng may not enter upon or seise any man's possessions upon te furmises without the intervention of a jury (x). It is owever particularly enacted by the statute 33 Hen. VIII. c. that, in case of attainder for high treason, the king shall we the forfeiture instantly, without any inquisition of office. nd, as the king hath no title at all to any property of this tt before office found, therefore by the statute 18 Hen. VI. 6. it was enacted that all letters patent or grants of lands d tenements before office found, or returned into the excheler, shall be void. And, by the bill of rights at the revotion, 1 W. & M. st. 2. c. 2. it is declared, that all grants d promises of fines and forfeitures of particular persons bere conviction (which is here the inquest of office) are illegal ld void; which indeed was the law of the land in the reign Edward the third (y).

WITH

⁽w) Finch. L. 82. (x) Gilb. hift. exch. 132. Hob. 347. (y) 2

rt o

the

ht

re

on

and

If,

ten

equ

in

nds ma

11

niv

ted

no

it

ice

fta icl

twe

01

ti

ntr th

500

WITH regard to real property, if an office be found for king, it puts him in immediate possession, without the trou of a formal entry, provided a subject in the like case wo have had a right to enter; and the king shall receive all times or intermediate profits from the time that his titles crued (z). As on the other hand, by the articuli super case (a), if the king's escheator or sheriff seise lands into the king hand without cause, upon taking them out of the king's ha again, the party shall have the mesne profits restored to his

In order to avoid the possession of the crown, acquired the finding of fuch office, the subject may not only have petition of right, which discloses new facts not found by office, and his monfirans de droit, which relies on the facts found; but also he may (for the most part) traverse or de the matter of fact itself, and put it in a course of trial by common law process of the court of chancery: yet full, fome special cases, he hath no remedy left but a mere petiti of right (b). These traverses, as well as the monstrans droit, were greatly enlarged and regulated for the benefit of subject, by the statutes before-mentioned, and others (And in the traverses thus given by statute, which came int place of the old petition of right, the party travering is co fidered as the plaintiff (d); and must therefore make out own title, as well as impeach that of the crown, and the shall have judgment quod manus domini regis amoveantur, &

3. WHERE the crown hath unadvisedly granted any thin by letters patent, which ought not to be granted (e), or where patentee hath done an act that amounts to a forfeiture of the orange.

⁽z) Finch. L. 325, 326. (a) 28 Edw. I. st. 3. c. 19. (b) Finc L. 324. (c) Stat. 34 Edw. III. c. 13. 36 Edw. III. c. 13. 2& Edw. VI. c. 8. (d) Law of nish prins, 202. (e) See book II. c 21.

e a

ar

ha hi

ed

e l

y t

ets de

yt

1

titi

of t

(c

CO

ut h

the

, &

thir

ret

of t

gra

Fine 2 &

II. c

ant (f), the remedy to repeal the patent is by writ of fcire in chancery (g). This may be brought either on the st of the king, or in order to resume the thing granted; or, the grant be injurious to a subject, the king is bound of the permit him (upon his petition) to use his royal name repealing the patent in a scire facias (h). And so also, if, on office untruly found for the king, he grants the land over another, he who is grieved thereby, and traverses the office left, is entitled before issue joined to a scire facias against the tentee, in order to avoid the grant (i).

AN information on behalf of the crown, filed in the exquer by the king's attorney general, is a method of fuit for overing money or other chattels, or for obtaining fatisfactiin damages for any personal wrong (k) committed in the ds or other possessions of the crown. It differs from an inmation filed in the court of king's bench, of which we I treat in the next book, in that this is instituted to redress hivate wrong, by which the property of the crown is afted, that is calculated to punish some public wrong, or nous misdemesnor in the defendant. It is grounded on no tunder feal, but merely on the intimation of the king's ter the attorney-general, who " gives the court to underfand and be informed of" the matter in question; upon ich the party is put to answer, and trial is had, as in suits ween fubject and fubject. The most usual informations are fe of intrusion and debt: intrusion, for any trespass commiton the lands of the crown (1), as by entering thereon withtitle, holding over after a leafe is determined, taking the ofts, cutting down timber, or the like; and debt, upon any tract for monies due to the king, or for any forfeiture due the crown upon the breach of a penal statute. This is most amonly used to recover forfeitures occasioned by transgrefgthose laws, which are enacted for the establishment and **fupport**

⁽f) Dyer. 198. (g) 3 Lev. 220. 4 Inft. 88. (h) 2 Ventr. 4. (i) Bro. Abr. t. scire facias. 69. 185. (k) Moot. 375. Cro. Jac. 212. 1 Leon. 48. Savil. 49.

. 17

utes

(r)

por

ruits

ts or

. 1

e an

hath

king

ase;

ids o

nout

THE

eof a

wn (

babl

lintr

matio

neral.

proc

his is nish t

to ou

olied

fran

non

DUR

dof

ngst

wnsir

(r) 2 I

9. 1

support of the revenue: others, which regard mere matter police and public convenience, being usually left to be in ced by common informers, in the qui tam informations or ons, of which we have formerly spoken (m). But after attorney general has informed upon the breach of a penal no other information can be received (n). There is all information in rem, when any goods are supposed to be the property of the crown, and no man appears to d them, or to dispute the title of the king. As antiently in case of treasure-trover, wrecks, waifs, and estrays, seifer the king's officer for his use. Upon such seisure an inform on was actually filed in the king's exchequer, and thereum proclamation was made for the owner (if any) to come in claim the effects; and at the fame time there iffued an mission of appraisement to value the goods in the off hands: after the return of which, and a fecond proclama had, if no claimant appeared, the goods were supposed lict, and condemned to the use of the crown (o). And w in later times, forfeitures of the goods themselves, as we personal penalties on the parties, were inflicted by act of liament for transgressions against the laws of the customs excise, the same process was adopted in order to secure forfeited goods for the public use, though the offender him had escaped the reach of justice.

of right for the king, against him who claims or usurps office, franchise, or liberty, to inquire by what auth ty he supports his claim, in order to determine the support as a franchise, or missurer or abuse of it; being a write manding the defendant to shew by what warrant he ercises such a franchise, having never had any grant of it having forfeited it by neglect or abuse. This was originater returnable before the king's justices at Westminster (q);

⁽m) See pag. 160. (n) Hard. 201. (o) Gilb. hift. of exch. 13. (p) Finch. L. 322.2 Inft. 282. (q) Old Nat. Brev. fel. edit. 1534.

nout the party who usurped it (t).

to

16

);

ch ol.

awards only before the justices in eyre, by virtue of the tes of quo warranto, 6 Edw. I. c. 1. and 18 Edw. I. st. (1) but fince those justices have given place to the king's porary commissioners of assis, the judges on the several wits, this branch of the statutes hath lost its effect (s); and so of quo warranto (if brought at all) must now be prosent and determined before the king's justices at Westmin-1. And in case of judgment for the defendant, he shall an allowance of his franchise; but in case of judgment the king, for that the party is entitled to no such franchise, with disused or abused it, the franchise is either seised into king's hands, to be granted out again to whomever he shall assis, or, if it be not such a franchise as may subsist in the ds of the crown, there is merely judgment of ousser, to

The judgment on a writ of quo warranto (being in the nation a writ of right) is final and conclusive even against the wn (u). Which together with the length of its process, bably occasioned that disuse into which it is now fallen, introduced a more modern method of prosecution, by intended in the court of king's bench by the attorney weral, in the nature of a writ of quo warranto; wherein process is speedier, and the judgment not quite so decisive. It is is properly a criminal method of prosecution, as well to wish the usurper by a fine for the usurpation of the franchise, to ous thim, or seise it for the crown: but hath long been blied to the mere purposes of trying the civil right, seising stranchise, or ousting the wrongful possessor; the sine becominal only.

DURING the violent proceedings that took place in the latter dof the reign of king Charles the second, it was among other logs thought expedient to new-model most of the corporation was in the kingdom; for which purpose many of those bodies

were

(1) 2 Inst. 498. Rast. Entr. 540, (s) 2 Inst. 498. (t) Cro. Jac. 9. 1 Show. 280. (u) 1 Sid. 86. 2 Show. 47. 12 Mod. 225.

Aio

T

fth

o el

fan

all

eed

nd f

W

iries

ully

ut o

iscut oft a

di

rease

ompl

nfib

Vo

were perfuaded to furrender their charters, and information the nature of quo warranto were brought against others, up a supposed, or frequently a real, forfeiture of their franch by neglect or abuse of them. And the consequence was, the liberties of most of them were seised into the hands of king, who granted them fresh charters with such alterations were thought expedient; and, during their state of anarc the crown named all their magistrates. This exertion power, though perhaps in fummo jure it was for the most firially legal, gave a great and just alarm; the new-model of all corporations being a very large stride towards establi ing arbitrary power; and therefore it was thought necessity at the revolution to bridle this branch of the prerogative, leaft fo far as regarded the metropolis, by statute 2 W. & c. 8. which enacts, that the franchises of the city of Lon shall never be forfeited again for any cause whatsoever.

This proceeding is however now applied to the decision corporation disputes between party and party, without any tervention of the prerogative, by virtue of the statute 9 A c. 20. which permits an information in nature of quo warre to be brought with leave of the court, at the relation of person desiring to prosecute the same, (who is then styled relator) against any person usurping, intruding into, or unle study holding any franchise or office in any city, borough, town corporate; provides for its speedy determination; directs that, if the desendant be convicted, judgment of ou (as well as a fine) may be given against him, and that the lator shall pay or receive costs according to the event of suit.

6. The writ of mandamus (w) is also made by the same stars of Ann. c. 20. a most full and effectual remedy in the first place in any such corporation; and, secondly, for wrongful moval, when a person is legally possessed. These are injure

ny

rra

of

ed

nl

th,

ou

he

of

ftal pli

ffic ful

jur

which though redress for the party interested may be had by file, or other means, yet as the franchises concern the pub-, and may affect the administration of justice, this prerogawrit also issues from the court of king's bench; comanding, upon good cause shewn to the court, the party comaining to be admitted or restored to his office. And the tute requires, that a return be immediately made to the mwrit of mandamus; which return may be pleaded to or averfed by the profecutor; and his antagonist may reply, take he or demur, and the same proceedings may be had, as if naction on the case had been brought for making a false rem: and, after judgment obtained for the profecutor, he all have a peremptory writ of mandamus to compel his adissimon or restitution; which latter (in case of an action) is felted by a writ of restitution (x). So that now the writ of andamus, in cases within this statute, is in the nature of an fion, and a writ of error may be had thereon (y).

This writ of mandamus may also be issued, in pursuance the statute 11 Geo. I. c. 4. in case within the regular time delection shall be made of the mayor or other chief officer say city, borough, or town corporate, or (being made) it all afterwards become void; to require the electors to prote to election, and proper courts to be held for admitting a swearing in the magistrates so respectively chosen.

We have now gone through the whole circle of civil inmies, and the redress which the laws of England have anximily provided for each. In which the student cannot
met observe, that the main difficulty which attends their
stuffion arises from their great variety, which is apt at our
met acquaintance to breed a confusion of ideas, and a kind
distraction in the memory: a difficulty not a little inmassed by the very immethodical arrangement, too justly
maplained of in our antient writers; but which will inmassed wear away when they come to be reconsidered,
Vol. III.

⁽x) 11 Rep. 79.

⁽y) 1 P. Wms. 351.

Ch

gre

(in

cate

E

whe

but

our

with

gove

grac

on v

his (

fent

affer

lean

a ne

hund

fove

may

plan

who quai

our

fettle

men

confi

there

dom

to d

the j

the c

of eff

dable

com

and we are a little familiarized to those terms of in which the language of our ancestors has obscured the Terms of art there will unavoidably be in all sciences; eafy conception and thorough comprehension of which m depend upon frequent use: and, the more subdivided : branch of science is, the more terms must be used to expr the nature of these several subdivisions, and mark out w fufficient precision the ideas they are meant to convey. T difficulty therefore, however great it may appear at first vie will shrink to nothing upon a nearer approach; and be rat advantageous than of any differvice, by imprinting a cleara distinct notion of the nature of these several remedies. A fuch as it is, it arises principally from the excellence of English laws; which adapt their redress exactly to the cumstances of the injury, and do not furnish one and fame action for different wrongs, which are impossible to brought within one and the same description: whereby ev man knows what satisfaction he is entitled to expect from courts of justice, and as little as possible is left in the bre of the judges, whom the law appoints to administer, and to prescribe the remedy. And I may venture to affirm, t there is hardly a possible injury, that can be offered either the person or property of another, for which the party jured may not find a remedial writ, conceived in fuch terms are properly adapted to his own particular grievance.

In the feveral personal actions which we have cursor explained, as debt, trespass, detinue, action on the cand the like, it is easy to observe how plain, perspicuo and simple the remedy is, as chalked out by the anticommon law. In real actions for the recovery of land and other permanent property, as the right is more intricathe feodal or rather Norman remedy by real actions is for what more complex and difficult, and attended with so delays. And since, in order to obviate those difficult and retrench those delays, we have permitted the rights real property to be drawn into question in mixed or p sonal surts, we are (it must be owned) obliged to have

COL

and

m

pr pr

T

ra

A

fo

d

to

ev

m

bre

d

, t

her

ty

ms

for

C

uo

nti

an

rica

for

fo

ult

hts

r

ve

cou

course to such arbitrary fictions and expedients, that unless we had developed their principles, and traced out their progress and history, and present system of remedial jurisprudence in respect of landed property) would appear the most intricate and unnatural, that ever was adopted by a free and enlightened people.

But this intricacy of our legal process will be found, when attentively confidered, to be one of those troublesome, but not dangerous, evils which have their root in the frame of our constitution, and which therefore can never be cured, without hazarding every thing that is dear to us. In absolute governments, when new arrangements of property and a madual change of manners have destroyed the original ideas. on which the laws were devised and established, the prince by his edict may premulge a new code, more fuited to the preentemergencies. But when laws are to be framed by popular assemblies, even of the representative kind, it is too Herculean a task to begin the work of legislation afresh, and extract anew system from the discordant opinions of more than five hundred counsellors. A fingle legislator or an enterprizing overeign, a Solon or Lycurgus, a Justinian or a Frederick, may at any time form a concise, and perhaps an uniform. plan of justice; and evil betide that presumptuous subject who questions its wisdom or utility. But who, that is acquainted with the difficulty of new-modelling any branch of our statute laws (though relating but to roads or to parishlettlements) will conceive it ever feasible to alter any fundamental point of the common law, with all its appendages and tonlequents, and fet up another rule in its stead? When therefore, by the gradual influence of foreign trade and domestic tranquillity, the spirit of our military tenures began to decay, and at length the whole structure was removed, the judges quickly perceived that the forms and delays of the old feodal actions, (guarded with their feveral outworks of effoins, vouchers, aid-prayers, and a hundred other formidable intrenchments) were ill suited to that more simple and commercial mode of property which succeeded the former, M 2

and required a more speedy decision of right, to facilita exchange and alienation. Yet they wifely avoided foliciting any great legislative revolution in the old established form which might have been productive of confequences mo numerous and extensive than the most penetrating genius cou foresee; but left them as they were, to languish in obscuri and oblivion, and endeavoured by a feries of minute contra vances to accommodate such personal actions, as were the in use, to all the most useful purposes of remedial justice and where, through the dread of innovation, they hefitate as going fo far as perhaps their good fense would have promp ed them, they left an opening for the more liberal and enter prizing judges, who have fate in our courts of equity, ' fhew them their error by supplying the omissions of the cour of law. And, fince the new expedients have been refined by the practice of more than a century, and are fufficient known and understood, they in general answer the purpose doing speedy and substantial justice, much better than cou now be effected by any great fundamental alterations. The only difficulty that attends them arises from their fictions an circuities, but, when once we have discovered the prop clew, that labyrinth is eafily pervaded. We inherit and Gothic castle, erected in the days of chivalry, but fitted u for a modern inhabitant. The moated ramparts, the emba tled towers, and the trophied halls. are magnificent and we nerable, but useles. The inferior apartments, now conver ed into rooms of convenience, are chearful and commodious though their approaches are winding and difficult.

In this part of our disquisitions I however thought it my dut to unfold, as far as intelligibly I could, the nature of these reactions, as well as of personal remedies. And this not only be cause they are still in sorce, still the law of the land, thoug obsolete and disused; and may perhaps, in their turn, be here after with some necessary corrections called out again into common use; but also because, as a sensible writer has well observed.

⁽z) Hawk, Abr. Co. Litt. pref.

m

ou

ıri

ntr

the

ate

np

op

whoever considers how great a coherence there is between the several parts of the law, and how much the reason of
one case opens and depends upon that of another, will I
presume be far from thinking any of the old learning useless, which will so much conduce to the perfect understanding of the modern." And besides I should have done great
justice to the founders of our legal constitution, had I led
the student to imagine, that the remedial instruments of our
aw were originally contrived in so complicated a form, as
the now present them to his view: had I, for instance, intirepassed over the direct and obvious remedies by assises and
this of entry, and only laid before him the modern method
of prosecuting a writ of ejectment.

M 3

in the figure glars, the way to which of the culture opposite which or the color water.

If the color of the culture was a color water.

CHAPTER

pour the Krozil asi to of the law, and how much there aid not on call cycon and depends upon that of headler, will I prime be du trom thinking any of the old learning vicewhich will partition continue to the parter tealing and

Seko Steles at Mood Land Sand

YCC ng re h

Wei

e p

fki

pon

ecel

orifo

erei

nd ·

omn

pr

the

e pr

(a) ties t

be le adance nent iy

CHAPTER THE EIGHTEENTH. and to elicate the remedial inframeric of pair

OF THE PURSUIT OF REMEDIES BY ACTION AND, FIRST, OF THE ORIGINAL WRIT.

were originally contrived in to complicated a sorin, see own green to his sieve had I, for enfance, infine-V and a fill it of a single obvious recipies by affile and of erery, and out a laid before had the modern anchold

HAVING, under the head of redress by suit in courts pointed out in the preceding pages, in the first place the nature and several species of courts of justice, wherei remedies are administred for all forts of private wrongs; and in the second place, shewn to which of these courts in parti cular application must be made for redress, according to the distinction of injuries, or, in other words, what wrongs at cognizable by one court, and what by another; I proceeded under the title of injuries cognizable by the courts of common law to define and explain the specifical remedies by action pro vided for every possible degree of wrong or injury: as we fuch remedies as are dormant and out of use, as those which are in every day's practice, apprehending that the reason the one could never be clearly comprehended, without form acquaintance with the other: and, I am now, in the la place, to examine the manner in which these several rem dies are purfued and applied, by action in the courts of com mon law; to which I shall afterwards subjoin a brief accon of the proceedings in courts of equity.

N

uti

th

ar

led

aru

pro

we

hic

n

om

011

oni

In treating of remedies by action at common law, I shall confine myself to the modern method of practice in our courts siguicature. For, though I thought it necessary to throw that sew observations on the nature of real actions, however apresent disused, in order to demonstrate the coherence and informity of our legal constitution, and that there was no inary so obstinate and inveterate, but which might in the end the eradicated by some or other of these remedial writs; yet twould be too irksome a task to perplex both my readers and myself with explaining all the rules of proceeding in these boolete actions; which are frequently mere positive establishments, the forma et sigura judicii, and conduce very little to suffrate the reason and fundamental grounds of the law. Wherever I apprehend they may at all conduce to this end, shall endeavour to hint at them incidentally.

WHAT therefore the student may expect in this and the meeding chapters, is an account of the method of proceedgin and profecuting a fuit upon any of the personal writs thave before spoken of, in the court of common pleas at Westminster; that being the court originally constituted for eprofecution of all civil actions. It is true that the courts king's bench and exchequer, in order, without intrenching on antient forms, to extend their remedial influence to the conflities of modern times, have now obtained a concurrent midiction and cognizance of civil fuits: but, as causes are terein conducted by much the same advocates and attorneys, nd the several courts and their judges have an entire mmunication with each other, the methods and forms proceeding are in all material respects the same in all them. So that, in giving an abstract or history (a) of eprogress of a suit through the court of common pleas, we M 4

⁽a) In deducing this history the student must not expect autholies to be constantly cited; as practical knowlege is not so much be learned from any books of law, as from experience and atmalance on the courts. The compiler must therefore be fresensity obliged to rely upon his own observations: which in
general.

shall at the same time give a general account of the proceedings of the other two courts; taking notice however of an considerable difference in the local practice of each. An the same abstract will moreover afford us some general ide of the conduct of a cause in the inferior courts of commo law, those in cities and boroughs, or in the court-baron, o hundred, or county court: all which conform (as near as make) to the example of the superior tribunals, to which the causes may probably be, in some stage or other, removed.

THE most natural and perspicuous way of considering the subject before us, will be (I apprehend) to pursue it in the order and method wherein the proceedings themselves sollow each other; rather than to distract and subdivide it by an more logical analysis. The general therefore and order parts of a suit are these; 1. The original writ: 2. The process: 3. The pleadings: 4. The issue or demurrer: 5. The trial: 6. The judgment, and its incidents: 7. The proceedings in nature of appeals: 8. The execution.

FIRST, then, of the original, or original writ; which is the beginning or foundation of the suit. When a person hathrece ved an injury, and thinks it worth his while to demand a satisfaction for it, he is to consider with himself, or take advice, whe redress the law has given for that injury: and thereupon is to

nak

ing th

PF

1

le

ier icti

o-p

ax

roc

ufti

ogn o th

ne 1

aro

oun

axc

pri

n th

udg with

3,

general he hath been studious to avoid, where those of any oth might be had. To accompany and illustrate those remarks, for gentlemen as are deligned for the profession will find it necessary peruse the books of entries, antient and modern; which are tran cripts of proceedings that have been had in some particular at ons. A book or two of technical learning will also be found vel convenient; from which a man of a liberal education and tolerab understanding may glean pro re nata as much as is sufficient for h purpole. These books of practice, as they are called, are all pret much on a level, in point of composition and solid instruction; that that which bears the latest edition is usually the best. B Gilber:'s history and practice of the court of Common-pleas is book of a very different stamp: and though (like the rest of b posthumous works) it has suffered most grossly by ignorant careless transcribers, yet it has traced out the reason of ma parts of our modern practice, from the feodal institutions and t primitive construction of our courts, in a most clear and ingenio manner.

II

ceed

An

ide

mo

n, (

ma

the

١.

gt

n th

ollo

an

der

pro

TH

ceed

is th

rece

fati

wh

is t

mak

oth

trat

ac

ve

erab

or h

n;

is of b

nt

mal

d the

ake application or fuit to the crown, the fountain of all juft, for that particular specific remedy which he is determined advised to pursue As, for money due on bond, an action debt; for goods detained without force, an action of. time or trover; or, if taken with force, an action of trefi vi et armis; or, to try the title of lands, a writ of entry action of trespass in ejectment: or, for any consequential jury received, a special action on the case. To this end he: to fue out, or purchase by paying the stated fees, an original original writ, from the court of chancery, which is the fina justitiae, the shop or mint of justice, wherein all the ing's writs are framed. It is a mandatory letter from the ing in parchment, fealed with his great feal (b), and directed the sheriff of the county wherein the injury is committed or pposed so to be, requiring him to command the wrongdoer party accused, either to do justice to the complainant, or to appear in court, and answer the accusation against m. Whatever the sheriff does in pursuance of this writ, must return or certify to the court of common pleas, togeer with the writ itself; which is the foundation of the juriffilion of that court, being the king's warrant for the judges proceed to the determination of the cause. For it was a axim introduced by the Normans, that there should be no meedings in common pleas before the king's justices withuthis original writ; because they held it unfit that those fices, being only the substitutes of the crown, should take guizance of any thing but what was thus expressly referred their judgment (c). However, in small actions, below e value of forty shillings, which are brought in the courtaron or county court, no royal writ is necessary : but the undation of fuch fuits continues to be (as in the times of the axons) not by original aurit but by plaint (d); that is, by private memorial tendered in open court to the judge, wherethe party injured fets forth his cause of action: and the, age is bound of common right to administer justice therein, thout any special mandate from the king. Now indeed even M 5 the 3

⁽b) Finch, L, 237. (c) Flet. 1. 2. c. 34. (d) Mir.ic. 2.

as I

a cc

10 33

as-b

give

1

cou

por

it b

min

at le

may

mof

of t

bus

1

infti

hath

form

inde

wer

not

(h

the royal writs are held to be demanded of common right on paying the usual fees: for any delay in the granting then or setting an unusual or exorbitant price upon them, would a breach of magna carta, c. 29. " nulli vindemus, nulli nego" bimus, aut differemus justitiam vel rectum.

ORIGINAL writs are either optional or peremptory; or, the language of our law, they are either a praecipe, or a te fecerit fecurum (e). The praecipe is in the alternative, com manding the defendant to do the thing required, or flew the reason wherefore he hath not done it (f). The use of the writ is where fomething certain is demanded by the plainti which is in the power of the defendant himself to perform as, to restore the possession of land, to pay a certain liquida ed debt, to perform a specific covenant, to render an account and the like: in all which cases the writ is drawn up in the form of a praecipe or command, to do thus or fliew cause the contrary; giving the defendant his choice, to redress the injury or fland the fuit. The other species of original wi is called a fi fecerit te fecurum, from the words of the wri which directs the sheriff to cause the defendant to appear court, without any option given him, provided the plaint gives the sheriff fecurity effectually to profecute his claim (g This writ is in use, where nothing is specifically demande but only a satisfaction in general; to obtain which and min fter complete redrefs, the intervention of some judicature necessary. fuch are writs of trespass, or on the case, where no debt or other specific thing is sued for in certain, by only damages to be affeffed by a jury. For this end thed fendant is immediately called upon to appear in court, pr vided the plaintiff gives good fecurity of profecuting his claim Both species of writs are teffe'd, or witnessed, in the king own name; "witness ourself at Westminster," or wherev the chancery may be held... hattou A TH

⁽e) Finch. L. 257. (f) Append. No. III. § 1, (g) A pend. No. II, § 1,

le 1

vri

r

in

The security here spoken of, to be given by the plaintist of prosecuting his claim, is common to both writs, though it gives denomination only to the latter. The whole of it is at present become a mere matter of form; and John Doe and Richard Roe are always returned as the standing pledges for this purpose. The antient use of them was to answer for the plaintist; who in case he brought an action without cause, or sailed in the prosecution of it when brought, was liable to an amercement from the crown for raising a false accusation; and so the form of the judgment still is (h). In like manner as by the Gothic constitutions no person was permitted to lay a complaint against another, "nisi subscriptura aut specificatione trium tessium, quod actionem vellet persequi (i):" and, as by the laws of Sancho I. king of Portugal, damages were given against a plaintist who prosecuted a groundless action (k...

THE day, on which the defendant is ordered to appear in court, and on which the sheriff is to bring in the writ and report how far he has obeyed it, is called the return of the writ; it being then returned by him to the king's justices at West-minster. And it is always made returnable at the distance of at least fifteen days from the date or teste, that the defendant may have time to come up to Westminster, even from the most remote parts of the kingdom; and upon some day in one of the four terms, in which the court sits for the dispatch of business.

THESE terms are supposed by Mr. Selden (1) to have been instituted by William the Conqueror: but sir Henry Spelman bath clearly and learnedly shewn, that they were gradually somed from the canonical constitutions of the church; being indeed no other than those leisure seasons of the year, which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural business. Throughout

⁽h) Finch. L. 189. 252. (i) Stiernh, de jure Gother. I. 3.

1.7. (k) Mod. Un. Hist. xxii. 45. (l) Jan. Angl. I.

CI

ver

nI

ffil

1001

en

E

gI

h

th

pr

ler

fpe

of tir

r fai

we e

ioly

artic

Mich

atut

TH

ban

fcor

dif

ench

reek

he ch

nits

enera

m l

inally de sta

out all Christendom, in very early times, the whole year wa one continual term for hearing and deciding causes. For the christian magistrates, to distinguish themselves from the hea thens, who were extremely superstitious in the observation of their dies fasti et nefasti, went into a contrary extreme, an administred justice upon all days alike. Till at length th church interposed, and exempted certain holy seasons from be ing profaned by the tumult of forensic litigations. As, parti cularly, the time of advent and christmas, which gave ri to the winter vacation; the time of lent and easter, which created that in the fpring; the time of pentecost, which pro duced the third; and the long vacation, between midfumme and michaelmas, which was allowed for the hay time an harvest. All Sundays also, and some peculiar festivals, as th days of the purification, ascension, and some others, wer included in the same prohibition; which was established by canon of the church, A. D. 517. and was fortified by an im perial conftitution of the younger Theodosius, comprised i the Theodosian code (m).

AFTERWARDS, when our own legal conflitution cam to be fettled, the commencement and duration of the law terms were appointed with an eye to those canonical prohibiti ons; and it was ordered by the laws of king Edward the con fessor (n), that from advent to the octave of the epiphany from feptuagesima to the octave of easter, from the ascensio to the octave of pentecost, and from three in the afternoon of all Saturdays till Monday morning, the peace of God and holy church shall be kept throughout all the kingdom. fo extravagant was afterwards the regard that was paid t these holy times, that though the author of the mirro (o) mentions only one vacation of any confiderable length containing the months of August and September, yet Brit ton is express (p), that in the reign of king Edward the fir no fecular plea could be held, nor any man fworn on the evange

⁽m) Spelman of the terms.

⁽n) c. 3. De temporibus et di

e

ti

c

O

ne

n

th

er

y

m

P

am

lav

iti

on

fio

n q

dd

An

d t

rro

gth

Brit

fir

th

nge

rangelists (q), in the times of advent, lent, pentecost, harvest nd vintage, the days of the great litanies, and all solemn stivals. But he adds, that the bishops and prelates did neentheless grant dispensations, (of which many are preserved Rymer's foedera of the time of King Henry the third) that files and juries might be taken in some of these holy seasons pon reasonable occasions. And soon afterwards a general difmation was established in parliament, by statute Westm. 1. Edw. I. c. 51. which declares, that "forasmuch as it is great charity to do right unto all men at all times when need hall be, by the affent of all, the prelates it was provided. that affifes of novel diffeifin, mort d'ancestor and darrein presentment should be taken in advent, septuagesima, and lent, even as well as inquests may be taken; and that at the special request of the king to the bishops." The portions ftime, that were not included within these prohibited seasons. Il naturally into a fourfold division; and, from some festival raint's day that immediately preceded their commencement, redenominated the terms of St. Hilary, of Easter, of the by Trinity, and of St. Michael: which terms have been me regulated and abbreviated by several acts of parliament; aticularly Trinity term, by statute 32 Hen. VIII. c. 2. and Sichaelmas term, by statute 16 Car. I. c. 6. and again by atute 24 Geo. II. c. 48.

THERE are in each of these terms stated days called days thank, dies in banco; that is, days of appearance in the court stommon pleas, called usually bancum, or commune bancum, distinguish it from bancum regis, or the court of king's much. They are generally at the distance of about a tek from each other, and regulated by some sestival of the church. On some one of these days in bank all original mis must be made returnable; and therefore they are merally called the returns of that term; whereof every man has more or less, said by the mirror (r) to have been originally sixed by king Alfred, but certainly settled as early as the statute of 51 Henry III. st. 2. But though many of the

(9) See page 58.

(r) €. 5. §. 108.

mes

mit;

roce

nterl

he lil

iftin

fign

ad en

But

ken l

wh

Thi

rion

hich

inal v

ngers

nd (b

erfona

(a) F

return days are fixed upon fundays, yet the court never fitst receive these returns till the monday after (s): and therefor no proceedings can be had, or judgment can be given, or sup posed to be given, on the sunday (t).

THE first return in every term is, properly speaking, the first day in that term; as, for instance, the octave of s Hilary, or the eighth day inclusive after the feast of that faint which, falling on the thirteenth of January, the octave then fore or first day of Hilary term is the twentieth of Januar And thereon the courts fit to take effoigns, or excuses f fuch as do not appear according to the fummons of the wi wherefore this is usually called the effoign day of the ten But the person summoned has three days of grace, bevor the return of the writ, in which to make his appearance and if he appears on the fourth day inclusive, the quarto post, it is sufficient. For our sturdy ancestors held it benez the condition of a freeman to be obliged to appear, or to any other act, at the precise time appointed or required. T feedal law therefore always allowed three diffinct days of ci tion, before the defendant was adjudged contumacious not appearing (u): preserving in this respect the Germ custom, of which Tacitus thus speaks (w), " illud ex lib " tate vitium, quid non simul nec justi conveniunt; sed et al " et tertius dies cunctatione coentium absumitur." And fimilar indulgence prevailed in the Gothic constitution: "i " enim nimiae libertatis indicium, concessa toties impunitas " parendi; nec enim trinis judicii concessibus poenam perdi " causae contumax meruit (x)." Therefore, at the beginn of each term, the court does not fit for dispatch of buin till the fourth day, as in Hilary term on the twenty third January; and in Trinity term, by statute 32 Hen. VIII 21. not till the fixth day; which is therefore usually called fet down in the almanacs as the first day of the term.

Снарт

⁽s) Registr. 19. Salk. 627. 6 Mod. 250 (t) 1 Jon. 1 Swann & Broome, B. R. Mich. 5 Geo. III. et in Dom. Proc. 17 (u) Feud. l. 2. t. 21. (w) De mor. Germ. c 11. (x) Stier jure Goth. l. 1. c. 6.

0

di

n

fin

rd

II

d

ie

CHAPTER THE NINETEENTH.

olle thyrning in the self as W. c.

e dans de crosse prior, civil prompos la La prioria la genia all ex-material de se

OF PROCESS.

THE next step for carrying on the suit, after suing out the original, is called the process; being the means of empelling the defendant to appear in court. This is sometimes called original process, being sounded upon the original ent; and also to distinguish it from mesne or intermediate rocess, which issues, pending the suit, upon some collateral aterlocutory matter; as to summon juries, witnesses, and the like (a). Mesne process is also sometimes put in contra-stanting of the suit.

But process, as we are now to consider it, is the method ten by the law to compel a compliance with the original writ, if which the primary step is by giving the party notice to obey. This notice is given upon all real praecipes, and also upon all stonal writs for injuries not against the peace, by fummons; thich is a warning to appear in court at the return of the original writ, given to the defendant by two of the sheriss's messes called fummoners, either in person or left at his house or and (b): in like manner as in the civil law the first process is by stonal citation, in jus vocando (c). This warning on the land is given,

⁽a) Finch. L. 436.

⁽b) Ibid. 344. 352.

⁽c) Ff. 2. 4. 1.

A

ant

1 1

ing

cap

Ifa

ples

ri

epri

mp

ace,

lo a

ecte

o ful

april at th

ble t

the

arre

en.

debi

dions

It Ita

it by

f, for

e old

mester ance nte f

throu

le and

given, in real actions, by erecting a white stick or wand of the defendant's grounds (d); (which stick or wand among the northern nations is called the baculus nunciatorius) (e) and be statute 31 Eliz. c. 3. the notice must also be proclaimed of some Sunday before the door of the parish church.

IF the defendant difobeys this verbal monition, the nex process is by writ of attachment, or pone, so called from the words of the writ (f), " pone per vadium et salvos plegios, pu " by gage and fafe pledges A. B. the defendant, &c." This is a writ, not iffuing out of chancery, but out of the cou of common pleas, being grounded on the non-appearance of the defendant at the return of the original writ; and thereb the theriff is commanded to attach him, by taking gage, the is, certain of his goods; which he shall for feit if he doth no appear (g); or by making him find fafe pledges or fureties who shall be amerced in case of his non-appearance (h). The is also the first and immediate process, without any previous fummons, upon actions of trespass vi et armis, or for other injuries, which though not forcible are, yet trespasses again the peace, as deceit and conspiracy (i); where the violence the wrong requires a more speedy remedy, and therefore the original writ commands the defendant to be at once attache without any precedent warning (k).

IF, after attachment, the defendant neglects to appear he not only forfeits this security, but is moreover to farther compelled by a writ of distringas (1), or distress is finite; which is a subsequent process issuing from the course of common pleas, commanding the sheriff to distress the defendant from time to time, and continually afterward by taking his goods and the profits of his lands, which he forfeits to the king if he doth not appear (m).

⁽d) Dalt. of ther. c. 31. (e) Stiernh. de jure Sueon l. 1. c. (f) Append. No. III. §. 2. (g) Finch. L. 345. (h) Dather. c. 32. (i) Finch L. 305. 352. (k) Append. No. §. 1. (l) Append. No. III. §. 2. (m) Finch. L. 352.

th

pu hi

u

2.0 eb

tha

ne ie

h

101

th

in

e tl

he

ea

1

ou

t

ard

hi

li

Da

0.

manner as by the civil law, if the defendant absconds, fo at the citation is of no effect, " mittitur adversarius in possessionem bonorum ejus (n)."

AND here by the common, as well as the civil law, the ncess ended in case of injuries without force: the defennt, if he had any fubstance, being gradually stripped of it by repeated diffresses, till he rendered obedience to the ag's writ; and, if he had no fubstance, the law held him capable of making fatisfaction, and therefore looked upon farther proceess as nugatory. And besides, upon feodal prinples, the person of a feudatory was not liable to be attached injuries merely civil, lest thereby his lord should be prived of his personal services. But, in cases of injury acmpanied with force, the law, to punish the breach of the ace, and prevent its disturbance for the future, provided ba process against the defendant's person, in case he neeffed to appear upon the former process of attachment, or had substance whereby to be attached; subjecting his body to prisonment by the writ of capias ad respondendum (o). at this immunity of the defendant's person, in case of peacethough fraudulent injuries, producing great contempt the law in indigent wrongdoers, a capias was also allowed arrest the person, in actions of account, though no breach the peace be suggested, by the statutes of Marlbridge, 52 m. III. c, 23. and West. 2, 13 Edw. I. c. 11. in actions debt and detinue, by statute 25 Edw. III. c. 17. and in all tions on the case, by statute 19 Hen. VII. c. 9. Before which I statute a practice had been introduced of commencing the itby bringing an original writ of trespass quare clausum frefor breaking the plaintiff's close, vi et armis; which by told common law subjected the defendant's person to be refled by writ of capias: and then afterwards, by conniace of the court, the plaintiff might proceed to profethe for any other less forcible injury. This practice brough custom rather than necessity, and for saving some trouand expense, in suing out a special original adapted to the parti-

⁽a) Ff. 2. 4. 19. (o) 3 Rep. 12.

ect

ppo d t

m, a

s t

ta

1, b

An

s, i

xin

BU

ocee en b

h

bias.

it,

er (1 mfe

ofte.

of

t (s

pro

cceff

m, a into

the

iz.

othe

(q)

particular injury) still continues in almost all cases, except actions of debt; though now, by virtue of the statutes abore cited and others, a capias might be had upon almost ever species of complaint.

IF therefore the defendant being summoned or attached makes default, and neglects to appear; or if the sheriff retun a nibil, or that the defendant hath nothing whereby he m be summoned, attached, or distreined; the capias now usual issues (p), being a writ commanding the sheriff to take t body of the defendant if he may be found in his bailiwick county, and him fafely to keep, fo that he may have him court on the day of the return, to answer to the plaintiff of plea of debt, or trespass, &c. as the case may be. The writ, and all others subsequent to the original writ, not issue out of chancery but from the court into which the original w returnable, and being grounded on what has passed in th court in consequence of the sheriffs return, are called judicia not original, writs; they iffue under the private feal of the court, and not under the great feal of England; and are telle not in the king's name, but in that of the chief justice only And these several writs being grounded on the sheriff's return must respectively bear date the same day on which the w immediately preceding was returnable.

This is the regular and orderly method of process. B it is now usual in practice, to sue out the capias in the sinstance, upon a supposed return of the sheriff; especial if it be suspected that the defendant, upon notice of the ation, will abscond: and afterwards a sictitious original drawn up, with a proper return thereupon, in order to go the proceedings a colour of regularity. When this capits delivered to the sheriff, he by his under-sheriff grants warrant to his inferior officers, or bailists, to execute it the defendant. And, if the sheriff of Oxfordshire (in which county the injury is supposed to be committed and the actions laid) cannot find the defendant in his jurisdiction, return

1.19.

101

ve:

h

u

m

ıal

k

n

of

T

ui

w

icil

th

te

nl

ur

W

B

ial

al

g

api

its

it

,

un

memon another writ issues, called a testatum capias (q), anded to the sheriff of the county where the defendant is possed to reside, as of Berkshire, reciting the former writ, dthat it is testified, testatum est, that the defendant lurks or unders in his bailiwick, wherefore he is commanded to take m, as in the former capias. But here also, when the action brought in one county, and the defendant lives in another, is usual, for saving trouble, time, and expense, to make tatestatum capias at the first: supposing not only an origitation as a former capias, to have been granted, which in shever was. And this siction, being beneficial to all parts, is readily acquiesced in, and is now become the settled actice; being one among many instances to illustrate that aim of law, that in sictione juris consistit aequitas.

BUT where a defendant absconds, and the plaintiff would need to an outlawry against him, an original writ must n be fued out regularly, and after that a capias. And if heriff cannot find the defendant upon the first writ of ias, and returns a non est inventus, there issues out an alias it, and after that a pluries, to the same effect as the forr(r): only after these words, "we command you," this me is inserted, "as we have formerly," or, "as we have often, commanded you; ficut alias," or, " ficut pluries, praecepimus." And, if a non eft inventus is returned upon of them, then a writ of exigent or exigi facias may be fued t(s), which requires the sheriff to cause the defendant to proclaimed, required, or exacted, in five county courts ceffively, to render himself; and, if he does, then to take n, as in a capias: but if he does not appear, and is returned into exactus, he shall then be outlawed by the coroners the county. Also by statutes 6 Hen. VIII. c. 4. and 31 in. c. 3. whether the defendant dwells within the fame or other county than that wherein the exigent is fued out, a writ of.

(9) Append. No. III. §. 2.

(r) Ibid.

(s) Ibid.

all t

to ar

with

title

e co

ould

s co

term

own herei

unty

just

min

e cor

elex

unty we h

efixe

is ac

nch

rved

the

fed

re bi

fend

app

doi

e co

(ON)

th

of proclamation (t) shall issue out at the same time with exigent, commanding the sheriff of the county, wherein defendant dwells, to make three proclamations thereof places the most notorious, and most likely to come to knowlege, a month before the outlawry shall take pla Such outlawry is putting a man out of the protection of law, so that he is incapable to bring any action for redress injuries; and it is also attended with a forfeiture of all on goods and chattels to the king. And therefore, till for time after the conquest, no man could be outlawed but felony; but in Bracton's time, and fomewhat earlier, proc of outlawry was ordained to lie in all actions for trespal vi et armis (u). And fince, by a variety of statutes (the far which allow the writ of capias, before-mentioned) process outlawry doth lie in divers actions that are merely civil; pr vided they be commenced by original and not by bill (w If after outlawry the defendant appears publickly, he may arrested by a writ of capias utlagatum (x), and committed the outlawry be reversed. Which reversal may be had the defendant's appearing personally in court (and in the king bench without any perfonal appearance, so that he appearance by attorney, according to statute 4 & 5 W. & M. c. 18.) a any plaufible cause, however slight, will in general be suf cient to reverse it, it being considered only as a process compel an appearance. But then the defendant must pay for cost, and put the plaintiff in the same condition, as if he h appeared before the writ of exigi facias was awarded.

SUCH is the first process in the court of common pleas. Ithe king's bench they may also (and frequently do) proceed certain causes, particularly in actions of ejectment at trespass, by original writ, with attachment and capias ther on (y); returnable, not at Westminster, where the common pleas are now fixed in consequence of magna cart but "ubicunque fuerimus in Anglia," wheresoever the kings.

⁽t) Append. No. III. §: 2. (u) Co. Litt 118. (w) Sid. 159. (x) Append. No. III. § 2. (y) Ibid. No. II. §

1.19.

ſs

y d

d

ng

ar

S

f

h

an

ner

on

art

kin

fha

(w)

then be in England; the king's bench being removeable many part of England at the pleasure and discretion of the wn. But the more usual method of proceeding therein without any original, but by a peculiar species of process titled a bill of Middlesex; and therefore so entitled, because court now fits in that county; for if it fate in Kent, it wild then be a bill of Kent. For though, as the justices of scourt have, by its fundamental constitution, power to termine all offences and trespasses, by the common law and from of the realm (z), it needed no original writ from the own to give it cognizance of any misdemesnor in the county herein it refides; yet as, by this court's coming into any mty, it immediately superseded the ordinary administration justice by the general commissions of eyre and of over and miner (a), a process of its own became necessary, within county where it fate, to bring in such persons as were acded of committing any forcible injury. The bill of Midfex (b) is a kind of capias, directed to the sheriff of that unty, and commanding him to take the defendant, and whim before our lord the king at Westminster on a day thixed, to answer to the plaintiff of a plea of trespass. For saccusation of trespass it is, that gives the court of king's ach jurisdiction in other civil causes, as was formerly obred; fince, when once the defendant is taken into custody the marshal, or prison-keeper of this court, for the supfed trespass, he, being then a prisoner of this court, may the profecuted for any other species of injury. Yet, in ter to found this jurisdiction, it is not necessary that the fendant be actually the marshal's prisoner; for, as soon as appears, or puts in bail, to the process, he is deemed by doing to be in fuch custody of the marshal, as will give court a jurisdiction to proceed (c). And, upon these wants, in the bill or process a complaint of trespass is alin suggested, whatever else may be the real cause of action. his bill of Middlesex must be served on the defendant the sheriff, if he finds him in that county: but, if he

⁽²⁾ Bro. Abr. 1. oyer & determiner. 8. (2) Bro. Abr. t. ifietion. 66. 3 Inst. 27. (b) Append. No. III. §. 3.

gh d ()

ufte

C. 2

icer

the

his

duce

open d h

ce;

0 11

ofec

nt c

ur, ter

d m

ed t

Bu

th, t

ards.

m p

at t

returns " non est inventus," then there issues out a wr latitat (d), to the sheriff of another county, as Berks, w is fimilar to the testatum capias in the common pleas, and cites the bill of Middlesex and the proceedings thereon. that it is testified that the defendant "latitat et discurrit" h and wanders about in Berks; and therefore commands sheriff to take him, and have his body in court on the da the return. But, as in the common pleas, the testatum ca may be fued out upon only a supposed, and not an actual. ceding capias; fo in the king's bench a latitat is usually out upon only a supposed, and not an actual, bill of Mid fex. So that, in fact, a latitat may be called the first pro in the court of king's bench, as the testatum capias is in common pleas. Yet, as in the common pleas, if the de dant lives in the county wherein the action is laid, a com capias fuffices; fo in the king's bench likewife, if he live Middlefex, the process must still be by bill of Middlefex of

In the exchequer, the first process is by writ of quo min order to give the court a jurisdiction over pleas between party and party. In which writ (e) the plaintiff is allege be the king's farmer, or debtor, and that the defendant done him the injury complained of, quo minus sufficiens ex by which he is the less able to pay the king his rent, ord And upon this the defendant may be arrested as upon a confrom the common pleas.

Thus differently do the three courts set out at first, in commencement of a suit; for which the reason is obvious fince by this means the two courts of king's bench and exquer entitle themselves to hold plea in subjects causes, who the original constitution of Westminster-hall, they not empowered to do. Afterwards, when the cause is drawn into the respective courts, the method of pursuing pretty much the same in all of them.

Append No. 11 9. g.

⁽d) Aprend. No. III. §. 4.

wind in

da ca l,

y Iid

ore

in

de

m

ive

r d

mi

etv

ege

nt

ex

ord

a co

vio

ex

wl

y

18

ng

Is the facriff has found the defendant upon any of the mer writs, the capias, latitat, &c. he was antiently oblito take him into custody, in order to produce him in court on the return, however finall and minute the cause of action ehtbe. For, not having obeyed the original fummons, he thewn a contempt of the court, and was no longer to be med at large. But when the fummens fell into difuse, and capias became in fact the first process, it was thought dto imprison a man for a contempt which was only suped: and therefore in common cases by the gradual indulace of the courts (at length authorized by statute 12 Geo. 6, 29. which was amended by statute 5 Geo. II. c. 27. and de perpetual by statute 21 Geo. II. c. 3.) the sheriff or his icer can now only personally serve the defendant with a copy the writ or process, and with notice in writing to appear his attorney in court to defend this action; which in effect luces it to a mere fummons. And if the defendant thinks per to appear upon this notice, his appearance is recorded, the puts in furcties for his future attendance and obedia; which fureties are called common bail, being the fame o imaginary persons that were pledges for the plaintiff's ecution, John Doe and Richard Roe. Or, if the defenat does not appear upon the return of the writ, or within m, (or, in some cases, eight) days after, the plaintiff may ter an appearance for him, as if he had really appeared; may file common bail in the defendant's name, and proed thereupon as if the defendant had done it himself.

But if the plaintiff will make affidavit, or affert upon th, that the cause of action amounts to ten pounds or uponds, then in order to arrest the defendant, and make in put in substantial sureties for his appearance, called tial bail, it is required by statute 13 Car. II. st. 2. c. 2. at the true cause of action should be expressed in the thy of the writ or process, This statute (without any the intention in the makers) had like to have ousted the mg's bench of all its jurisdiction over civil injuries without force:

official Cultions.

In

ray

yt

ill (

ent

ot r

or t

5

on

uito

ny c

win

omir

ing's

or in

The

eed i

roteE

al,

f his

itor i

im ti

Ed

othe

Voi

(i) V

Mod

at her

albeit

few of

ng W

om be

at app

force: for, as the bill of Middlesex was framed only actions of trespass, a defendant could not be arrested and h to bail thereupon for breaches of civil contracts. But to medy this inconvenience, the officers of the king's bench vised a method of adding what is called a clause of ac et to the usual complaint of trespass; the bill of Middlesex co manding the defendant to be brought in to answer the plain of a plea of trespass, and also to a bill of debt (f): the co plaint of trespass giving cognizance to the court, and that debt authorizing the arrest. In return for which, lord of justice North, a few years afterwards, in order to fave fuitors of his court the trouble and expense of fuing out fper originals, directed that in the common pleas, besides the u complaint of breaking the plaintiff's close, a clause of acet might be also added to the writ of capias, containing the cause of action; as, "that the said Charles the defend " may answer to the plaintiff of a plea of trespass in break " his close: and also, ac etiam, may answer him, accord " to the custom of the court, in a certain plea of trespass u "the case upon promises, to the value of twenty pour " &c. (g)." The fum fworn to by the plaintiff is man upon the back of the writ; and the sheriff, or his off the bailiff, is then obliged actually to arrest or take into tody the body of the defendant, and, having so done, to turn the writ with a cepi corpus endorfed thereon.

An arrest must be by corporal seising or touching the fendant's body; after which the bailiss may justify break open the house in which he is, to take him: other he has no such power; but must watch his opportunity arrest him. For every man's house is looked upon the law to be his castle of defence and asylum, when he should suffer no violence. Which principle is can so far in the civil law, that for the most part not so may as a common citation or summons, much less an arrest, be executed upon a man within his own walls (h). Peer

⁽f) Append. No. III. §. 3. (g) Lilly pract. Reg. f. etiam. North's life of lord Guilford. 99. (h) ff. 2

eti

rd

un

off

to

he

ak

erv

nity

on

carr

m ft,

eer

realm, members of parliament, and corporations, are mileged from arrefts; and of course from outlawries (i). and against them the process to inforce an appearance must by fummons and diffress infinite, instead of a capias. Also eks, attorneys, and all other persons attending the courts fuffice (for attorneys, being officers of the court, are alays supposed to be there attending) are not liable to be arrested the ordinary process of the court, but must be fued by I (called usually a bill of privilege) as being personally preatin court (k). Clergymen performing divine fervice, and atmerely staying in the church with a fraudulent defign, are the time privileged from arrefts, by statute 50 Edw. III. gand I Ric. II. c. 16. as likewise members of convocam actually attending thereon, by flatute 8 Hen. VI. c. 1. utors, witnesses, and other persons, necessarily attending y courts of record upon business, are not to be arrested ming their actual attendance, which includes their necessary ming and returning. And no arrest can be made in the ing's presence, nor within the verge of his royal palace. rin any place where the king's justices are actually fitting. he king hath moreover a special prerogative, which ined is very feldom exerted, (1) that he may by his writ of medion privilege a defendant from all personal, and many al, fuits for one year at a time, and no longer; in respect his being engaged in his service out of the realm (m). nd the king also by the common law might take his cretorinto his protection, so that no one might sue or arrest m till the king's debt were paid (n): but by the statute Edw. III. ft. 5. c. 19. notwithstanding such protection, wher creditor may proceed to judgment against him, with a VOL. III.

⁽i) Whitelock of Parl. 206, 207. (k) Bio. Abr. t. bille. 29. Mod. 163. (l) Sir Edward Coke informs us, (1 Infl. 131.) at herein "he could fay nothing of his own experience; for albeit Queen Elizabeth maintained many wars, yet she granted sew or no protections; and her reason was, that he was no sit subject to be employed in her service, that was subject to other mens actions; lest she might be thought to delay justice." But me William, in 1692, granted one to lord Cutts, to protect him m being outlawed by his taylor: (3 Lev. 332.) which is the last at appears upon our books. (m) Finch. L. 454. 3 Lev. 332. F. N. B. 28. Co. Litt. 131.

BOOK III ftay of execution, till the king's debt be paid; unless fun creditor will undertake for the king's debt, and then he ha have execution for both. And, lastly, by statute 29 Car. I c. 7. no arrest can be made, nor process served upon a Sundar except for treason, felony, or breach of the peace.

WHEN the defendant is regularly arrested, he must eithe go to prison, for safe custody; or put in special bail to the theriff. For, the intent of the arrest being only to compe an appearance in court at the return of the writ, that purpol is equally answered, whether the sheriff detains his person or takes sufficient security for his appearance, called bail (from the French word, bailler, to deliver) because the defendant is bailed, or delivered, to his fureties, upon their giving fe curity for his appearance; and is supposed to continue in the friendly custody instead of going to gaol. The method putting in bail to the sheriff is by entering into a bond of obligation, with one or more fureties (not fictitious persons as in the former case of common bail, but real, substantial responsible bondsmen) to insure the defendant's appearance at the return of the writ; which obligation is called the ba bond (o). The sheriff, if he pleases, may let the defendant go without any fureties; but that is at his own peril: for after once taking him, the sheriff is bound to keep him safe ly, so as to be forthcoming in court; otherwise an action lie against him for an escape. But, on the other hand, he is ob liged, by statute 23 Hen. VI. c. 10. to take (if it be tendered a sufficient bail-bond: and, by statute 12 Geo. I. c. 29. th sheriff shall take bail for no other sum than such as is swon to by the plaintiff, and endorsed on the back of the writ.

TH

op

le b

bef

d fe

the

rhi

cogr

title lify

em t

me

Ait

utua

inti

loss

min: fend

ace o

ferer

licati

(p) A Ff.

UPON the return of the writ, or within four days after, the defendant must appear according to the exigence of the wri This appearance is effected by putting in and justifying bail the action; which is commonly called putting in bail above. this be not done, and the bail that were taken by the sheri on

OI

an

fe

hei

10

1 0

ons

ia

mo

ba

lan

for

afe

lie

ob

red

th

701

t.

, th

vri

ul

.

eri

10.7

mu are responsible persons, the plaintiff may take an assignant from the sheriff of the bail-bond (under the statute 4 & Ann. c. 16.) and bring an action thereupon against the siff's bail. But if the bail, so accepted by the sheriff, be solvent persons, the plaintiff may proceed against the sheriff melf, by calling upon him, first, to return the writ (if not rady done) and afterwards to bring in the body of the demant. And, if the sheriff does not then cause sufficient il to be put in above, he will himself be responsible to the antiff.

THE bail above, or bail to the action, must be put in either open court, or before one of the judges thereof; or elfe. the country, before a commissioner appointed for that purto by virtue of the statute 4 W. & M. c. 4. which must be usmitted to the court. These bail, who must at least be oin number, must enter into a recognizance (p) in court before the judge or commissioner, whereby they do jointly feverally undertake, that if the defendant be condemned the action he shall pay the costs and condemnation, or renhimself a prisoner; or that they will pay it for him: which ognizance is transmitted to the court in a flip of parchment titled a bail piece (q). And, if required, the bail must If themselves in court, or before the commissioner in the untry, by swearing themselves house-keepers, and each of m to be worth double the fum for which they are bail, after ment of all their debts. This answers in some measure to spulatio or satistatio of the Roman laws (r), which is tually given by each litigant party to the other: by the miff, that he will profecute his fuit, and pay the costs if loses his cause; in like manner as our law still requires minal pledges of profecution from the plaintiff; by the findant, that he shall continue in court, and abide the sente of the judge, much like our special bail; but with this ference, that the fide justores were there absolutely bound hatum folvere, to see the costs and condemnation paid

(p) Append. No. III. § 5. (q) Ibid. (r) Inft. 1. 4. t.

at all events: whereas our special bail may be discharged, furrendering the defendant into custody, within the tirallowed by law; for which purpose they are at all times entitle to a warrant to apprehend him (s).

on the mister sels associate in the SPECIAL bail is required (as of course) only upon action of debt, or actions on the case in trover or for money de where the plaintiff can swear that the cause of action amoun to ten pounds: but in actions where the damages are pred rious, being to be affeffed ad libitum by a jury, as in action for words, ejectment, or trespass, it is very seldom possi for a plaintiff to fwear to the amount of his cause of action and therefore no special bail is taken thereon, unless by judge's order or the particular directions of the court, some peculiar species of injuries, as in cases of mayhem atrocious battery; or upon fuch special circumstances, as ma it absolutely necessary that the defendant should be kept with the reach of justice. Also in actions against heirs, executo and administrators, for debts of the deceased, special bail not demandable: for the action is not so properly again them in person, as against the effects of the deceased in th possession. But special bail is required even of them, in all ons for a devastavit, or wasting the goods of the decease that wrong being of their own committing.

Thus much for process; which is only meant to bring defendant into court, in order to contest the suit, and abide determination of the law. When he appears either in per as a prisoner, or not upon bail, then follow the pleadings tween the parties, which we shall consider at large in the n chapter.

(s) 2 Show, 202. 6 Mod. 231. mbs/4 km

of the judges, much

TE

tier

is ca

on i

efenc

hpp

e pla

m to

en befit o

1) A

of free level for the lateral and the lateral with the open blooming a coon this well; the elaintiff the art yachatta atha eathar after after an artist and

I

ffil io by ,

m

ma

vitl

uto

ail

gai

th 1 ad

eafe

ng

de

per

gs

e n

hr

PT

CHAPTER THE TWENTIETH

OF PLEADING.

ALEADINGS are the mutual altercations between the plaintiff and defendant; which at present are set down delivered into the proper office in writing, though formy they were usually put in by their counsel ore tenus, or wa voce, in court, and then minuted down by the chief rks, or prothonotaries; whence in our old law French the adings are frequently denominated the parol.

THE first of these is the declaration, narratio, or count, tiently called the tale (a); in which the plaintiff sets forth scause of complaint at length: being indeed only an ampliation or exposition of the original writ upon which his acin is founded, with the additional circumstances of time d place, when and where the injury was committed. emay remember (b) that, in the king's bench, when the fendant is brought into court by bill of Middlesex, upon apposed trespass, in order to give the court a jurisdiction, plaintiff may declare in whatever action, or charge him th whatever injury, he thinks proper; unless he has held n to bail by a special ac etiam, which the plaintiff is an bound to purfue. And so also, in order to have the befit of a capias to secure the defendant's person, it was the tient practice and is therefore still warrantable in the com-N 3

Append. No. II S. 2. No. III. S. 6. (b) See pag. 285. 288.

go

bl

po lat

to

fuc

tion

he

u d

quen of th

put the

he :

now Ince

cont

A

if s

charc

pere

o a

n ca

verdi

(f)

mon pleas, to fue out a writ of trespass quare clausum free for breaking the plaintiff's close; and when the defendant once brought in upon this writ, the plaintiff declares in where action the nature of his actual injury may require; an action of covenant, or on the case for breach of contra or other less forcible transgression (c); unless, by holding defendant to bail on a special ac etiam, he has bound him to declare accordingly.

294

In local actions, where possession of land is to be recover or damages for an actual trespais, or for waste, &c. affect land, the plaintiff must lay his declaration or declare his jury to have happened in the very county and place that really did happen; but in transitory actions, for injuries t might have happened any where, as debt, detinue, fland and the like, the plaintiff may declare in what county pleases, and then the trial must be in that county in wh the declaration is laid. Though if the defendant will m affidavit, that the cause of action, if any, arose not in t but in another county, the court will direct a change of venue, or vifne, (that is, the vicinia or neighbourhood which the injury is declared to be done) and will oblige plaintiff to declare in the proper county. For the flatut Ric. II. c. 2. having ordered all writs to be laid in their p per counties, this, as the judges conceived, impowered th to change the venue, if required, and not to infift rigidly abating the writ: which practice began in the reign of Jar the first (d). And this power is discretionally exercised, so not to cause but prevent a defect of justice. Therefore court will not change the venue to any of the four north counties, previous to the spring circuit; because there affises are holden only once a year, at the time of the st mer circuit. And it will sometimes remove the venue fr the proper jurisdiction, (especially of the narrow and limit kind) upon a fuggestion, duly supported, that a fair and partial trial cannot be had therein (e).

⁽c) 2 Ventr. 259. (d) 2 Salk. 670. (e) Stra. 874.

ın

vh

;

tra

m

ver

ect

is

tha

s t

and

ity

wh

m

in t

ood

ir p

i th

dly

Jan d, fo

ore

orth

ere e fu

e fr

limi nd i

It is generally usual in actions upon the case to set forth feveral cases, by different counts in the same declaration; so hat if the plaintiff fails in the proof of one, he may succeed nanother. As, in an action on the case upon an assumpsit for goods fold and delivered, the plaintiff usually counts or declares, first, upon a settled and agreed price between him and the defendant; as that they bargained for twenty pounds: and left he should fail in the proof of this, he counts likewise upon, quantum valebant; that the defendant bought other . goods, and agreed to pay him fo much as they were reasonaby worth; and then avers that they were worth other twenty nounds: and fo on in three or four different shapes; and at lat concludes with declaring, that the defendant had refused wfulfil any of these agreements, whereby he is endamaged to such a value. And if he proves the case laid in any one of is counts, though he fails in the rest, he shall recover proportonable damages. This declaration always concludes with hese words, " and thereupon he brings suit, &c. inde pro-"ducit sectam, &c." By which word, suit, or secta, (a fequendo) were antiently understood the witnesses or followers of the plaintiff (f). For in former times the law would not but the defendant to the trouble of answering the charge, till the plaintiff had made out at least a probable case (g). But he actual production of the fuit, the fecta, or followers, is low antiquated; and hath been totally disused, at least ever ince the reign of Edward the third, though the form of it still continues.

At the end of the declaration are added also the plainiff's common pledges of prosecution, John Doe and Rihard Roe, which, as we before observed (h), are now
mere names of form; though formerly they were of use
to answer to the king for the amercement of the plaintiff,
in case he were nonsuited, barred of his action, or had a
redict and judgment against him (i). For, if the plainiff neglects to deliver a declaration for two terms after

N 4

⁽f) Seld. on Fortesc. c. 21. (g) Bract. 400. Flet. l. 2. c. 6.

er) Hati

rten

alou

the

ne li

laine

here

ut r

on cury, m), ight

he te

hat i

nacci

nenti

uch,

a WI

ght

am i

e co

hat t

nd t

ear,

ot

T

hou

the defendant appears, or is guilty of other delays or defaul against the rules of law in any subsequent stage of the action he is adjudged not to follow or purfue his remedy as he ough to do, and thereupon a nonfuit, or non prosequitur, is enter ed; and he is said to be nonpros'd. And for thus deserting his complaint, after making a false claim or complaint (pre falso clamore suo) he shall not only pay costs to the defendan but is liable to be amerced to the king. A retraxit differ from a nonfuit, in that the one is negative, and the other po fitive: the nonfuit is a default and neglect of the plaintiff and therefore he is allowed to begin his fuit again, upon pay ment of costs; but a retraxit is an open and voluntary re nunciation of his fuit, in court, and by this he for ever lose his action. A discontinuance is somewhat similar to a nonsuit for when a plaintiff leaves a chasin in the proceedings of hi cause, as by not continuing the process regularly from day t day, and time to time, as he ought to do, the fuit is discon tinued, and the defendant is no longer bound to attend; bu the plaintiff must begin again, by suing out a new origina usually paying costs to his antagonist. Antiently, by the de mife of the king, all fuits depending on his courts were once discontinued, and the plaintiff was obliged to renev the process, by suing out a fresh writ from the successor; the virtue of the former writ being totally gone, and the defen dant no longer bound to attend in consequence thereof: but to prevent the expense as well as delay attending this rule of law, the statute's Edw. VI. c. 7. enacts, that by the deat of the king no action shall be discontinued; but all proceed ings shall stand good as if the same king had been living.

WHEN the plaintiff hath stated his case in the declaration it is incumbent on the defendant within a reasonable time to make his defence and put in a plea; or else the plaintiff will at once recover judgment by default, or nihil dicit of the defendant.

DEFENCE, in its true legal fense, signifies not a justification protection, or guard, which is now its popular justification gl ter

in

20

in fer

po

tif

ay

re

ofe

iit

h

y t

on

bu

na

de

e a

nev

th

ut

0

at

ed

.

on

t

vil de

on n ou

merely an opposing or denial (from the French verb defenn) of the truth or validity of the complaint. It is the confatio litis of the civilians: a general affertion is afterwards tended and maintained in his plea. For it would be ridilous to suppose that the defendant comes and defends (or, the vulgar acceptation, justifies) the force and injury, in me line, and pleads that he is not guilty of the trespass comaimed of, in the next. And therefore in actions of dower, here the demandant does not count of any injury done, at merely demands her endowment (k), and in affifes of ad, where also there is no injury alleged, but merely a quefon of right stated for the determination of the recognitors or ry, the tenant makes no fuch defence (1). In writs of entry m), where no injury is stated in the count, but merely the ght of the demandant and the defective title of the tenant, etenant comes and defends or denies bis right, jus suum, at is (as I understand it, though with a small grammatical accuracy) the right of the demandant, the only one expressly untioned in the pleadings : , or else denies his own right to be th, as is suggested by the count of the demandant. And writs of right (n) the tenant always comes and defends the ght of the demandant and his seisin, jus prædicti S. et seisiun ipfus (0), (or else the seisin of his ancestor, upon which ecounts, as the case may be) and the demandant may reply at the tenant unjustly defends his, the demandant's right, d the feilin on which he counts (p). All which is extremely lar, if we understand by defence an opposition, or denial, but otherwise inexplicably difficult (q).

THE courts were formerly very nice and curious with respect the nature of the defence, so that if no defence was made, hough a sufficient plea was pleaded, the plaintiff should recover N 5

(k) Rastal. entr. 234. (1) Booth of real actions. 118. (m) of II. append. No. V. S. 2. (n) Append. No. I. S. 5. (o) Co. atr. 182. (p) Now. Narr. 230.edit. 1534. (q) The true reason this, says Booth, (on real actions, 94. 112.) I could never the find.

bre fer

cap

the

pra ple

efta

hat

cun

is, the

fwe

defe

mo

a fp

wea

per'

defe

defa

and

defi

que

wer

of t

cher

to a

the

aga

in a

judgment (r): and therefore the book, entitled novae narrationes or the new talys (s), at the end of almost every coun narratio, or tale, subjoins such defence as is proper for the defendant to make. For a general defence or denial was no prudent in every situation, since thereby the propriety of the writ, the competency of the plaintist, and the cognizance of the court, were allowed. By defending the force and injurt the defendant waved all pleas of misnosmer (t); by defending the damages, all exceptions to the person of the plaintist and by defending either one or the other when and when it should behave him, he acknowledged the jurisdiction of the court (u). But of late years these niceties have been ver deservedly discountenanced (w); though they still seem to law, if insisted on (x).

AFTER defence made, the defendant must put in his place. But, before he pleads, he is entitled to demand one imparlant (y), or licentia loquendi, and may have more granted by confent of the plaintiff; to see if he can end the matter amicable without farther suit, by talking with the plaintiff: a practice which is (z) supposed to have arisen from a principle of religion, in obedience to that precept of the gospel, "agre "with thine adversary quickly, whilst thou art in the way with him (a)." And it may be observed that this gospel precept has a plain reference to the Roman law of the twelve tables which expressly directed the plaintiff and defendant to make up the matter, while they were in the way, or going to the praetor; in via rem uti pacunt orato. There are also man other previous steps which may be taken by a defendant before he puts in his plea. He may, in real actions, demand a view

⁽r) Co. Litt. 127. (8) Edit. 1534. (t) Theloal. di. 1. 14. c. 1. pag. 357. (u) En la defence sont iij choses entendantz: per tant quil desende tort et sorce, home doyt entendre qui se excuse de tort a luy surmys per counte, et sait se partie alphe et per tant quil desende les damages, il affirme le partie able destrespondu; et per tant quil desende ou et quant il devera, il accep la potar de courte de conustre ou trier lour ple. (Mod. tenend. cut 408. edit. 1534.) See also Co. Litt. 127. (w) Salk. 21 Lord Raym. 282. (x) Carth. 230. Lord Raym. 117. (y) Append No. III. §. 6. (2) Gilb. Hist. Com. Pl. 35.

10

ne

u

lin

iff

ber

th

ver

ob

lea

and

con

abl

tice

reli

gre

wit

cep

les

nak

th

an

for

ies

ene

21 A

of the thing in question, in order to ascertain its identy and ther circumstances. He may crave over (b) of the writ, or of the bond, or other specialty upon which the action is brought; that is to bear it read to him; the generality of defendants in the times of antient simplicity being supposed inanable to read it themselves: whereupon the whole is enterwerbatim upon the record, and the defendant may take alvantage of any condition or other part of it, not stated in heplaintiff's declaration. In real actions also the tenant may may in aid, or call for affiftance of another, to help him to plead, because of the feebleness and imbecility of his own thate. Thus a tenant for life may pray in aid of him that bath the inheritance in remainder or reversion; and an inumbent may pray in aid of the patron and ordinary: that is, that they shall be joined in the action and help to defend hetitle. Voucher also is the calling in of some person to anwer the action, that hath warranted the title to the tenant or defendant. This we still make use of in the form of common recoveries (c), which are grounded on a writ of entry; aspecies of action that we may remember relies chiefly on the weakness of the tenant's title, who therefore vouches another person to warrant it. If the vouchee appears, he is made defendant instead of the voucher; but, if he afterwards makes default, recovery shall be had against the original defendant; and he shall recover over an equivalent in value, against the deficient vouchee. In affises indeed, where the principal question is, whether the demandant, or his ancestors were or were not in possession till the ouster happened, and the title of the tenant is little (if at all) discussed, there no vouther is allowed; but the tenant may bring a writ of warrantia chartae against the warrantor, to compel him to affift him with a good plea or defence, or else to render damages and the value of the land, if recovered against the tenant (d). In many real actions also (e), brought by or against an infant under the age of twenty one years, and also nactions of debt brought against him, as heir to any deceased ancestor, either party may suggest the nonage of the infant,

⁽b) Append. No. III. §. 6. (c) Vol. II. append. No. V. §. 2. (d) F. N. B. 135. (e) Dyer. 137.

Ch.

fn

acts

be d

o t

lov

be bi

inle.

ndg

W

hen

ory

s te

he p

ury

uit.

whic

ourt

tari

uest

nanc

lain

or co

awe

inde

ious

effed

(n) he ch ass t

ajea

fant, and pray that the proceedings may be deferred till his full age, or in our legal phrase that the infant may have hi age, and that the parol may demur, that is, that the pleading may be staid; and then they shall not proceed till his full age unless it be apparent that he cannot be prejudiced thereby (f). But by the statutes of Westm. 1. 3 Edw. I. c. 46 and of Glocester 6 Edw. I c. 2. in writs of entry fur diffeil in some particular cases, and in actions auncestrel brought b an infant, the parol shall not demur : otherwise he might b deforced of his whole property, and even want a maintenance till he came of age. So likewise in a writ of dower the hei shall not have his age; for it is necessary that the widow claim be immediately determined, else she may want a pre fent subsistence (g). Nor shall an infant patron have it in quare impedit (h), fince the law holds it necessary and expe dient, that the church be immediately filled. It is in this stage also of the cause, if at all, that cognisance of the sui must be claimed or demanded; when any person or body corporate hath the franchife not only of bolding pleas within particular limited jurisdiction, but also of the cognizance of pleas: and that, either without any words exclusive of other courts, which entitles the lord of the franchise, whenever any fuit that belongs to his jurisdiction is commenced in the courts at Westminster, to demand the cognizance thereof; or with fuch exclusive words, which also entitle the defendant to plead to the jurisciction of the court (i). Upon this claim of cognizance, if allowed, all proceedings shall cease in the superior court, and the plaintiff is left at liberty to purfue his remedy in the special jurisdiction. As, when a scholar or other privileged person of the universities of Oxford or Cambridge is impleaded in the courts at Westminster, for any cause of action whatsoever, unless upon a question of freehold (k). In these cases, by the charter of those learned bodies, confirmed by act of parliament, the chancellor of vice-chancellor may put in a claim of cognizance; which

⁽f) Finch. L. 360 (g) 1 Roll. Abr. 137. (h) Ibid. 138 (i) 2 Lord Raym. 836. 10 Mod. 126. (k) See pag. 83.

ıg

ge

46

ifu

b

ce

nei

W,

re-

n a

pe-

his

fui orn a

her

any

irts

oith

ead

og-

rior

her

mfor

of ned

ch ii 38 f made in due time and form, and with due proof of the sets alleged, is regularly allowed by the courts (1). It must be demanded before any imparlance, for that is a submission the jurisdiction of the superior court: and it will not be slowed if it occasions a failure of justice (m), or if an action brought against the person himself who claims the franchise, sales he hath also a power in such case of making another sales (n).

When these proceedings are over, the defendant must be put in his excuse or plea. Pleas are of two sorts; dilatory pleas, and pleas to the action. Dilatory pleas are such stend merely to delay or put off the suit, by questioning be propriety of the remedy, rather than by denying the intury: pleas to the action are such as dispute the very cause of which is an acknowledgement of the propriety of the action.

I. DILATORY pleas are, 1. To the jurisdiction of the mut: alleging, that it ought not to hold plea of this injury, tarifing in Wales or beyond sea; or because the land in mestion is of antient demesne, and ought only to be demanded in the lord's court, &c. 2. To the disability of the laintist, by reason whereof he is incapable to commence or continue the suit; as, that he is an alien enemy, outwell, excommunicated, attainted of treason or felony, under a praemunire, not in rerum natura (being only a sictious person) an infant, a seme-covert, or a monk prosended. 3. In abatement: which abatement is either of the writ,

(n) Hardr. 505. (m) 2 Ventr. 363.

(n) Hab. 87. Yearbook, M. 8 Hen. VI. 20. In this latter case be chancellor of Oxford claimed cognizance of an action of tresults brought against himself; which was disallowed, because he will not be judge in his own cause. The argument used by speak Rosse, on behalf of the cognizance, is curious and worth master bing — Jeo wens dirai un sable. En ascum temps suit un pape, wit sait un grand offence, et le cardinals windrent a luy et disyent thy, "peccasti:" et il dit, "judica me:" et ils disyent, "non possuomus, quia caput es ecclesiae; judica teipsum:" et l'apostol' dit,
judico me cremari;" et suit combustus; et apres suit un sainct.

In ecc cas il suit son jugo demene, et issint n'est pas inconvenient
un reme soit juge demene.

Ch.

the o

u fa

dud

"th

men

decl

11 17

mad

muft

on:

COT

N

her

11

a ne

mer

other

udg

bette

of th

A

for t

or n

fom

hara fary

tend trif

ten

case

in

302

writ, or the count, for some defect in one of them; as b misnaming the defendant, who is called a misnosmer; givin him a wrong addition, as efquire instead of knight; or other want of form in any material respect. Or, it may be, that the plaintiff is dead; for the death of either party is at on an abatement of the fuit. And in actions merely personal arifing ex delicto, for wrongs actually done or committed b the defendant, as trespass, battery, and slander, the rule that actio perfonalis moritur cum persona (o); and it never sha be revived either by or against the exeutors or other repre fentatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in the own personal capacity, any manner of wrong or injury But in actions arising ex contractu, by breach of promise an the like, where the right descends to the representatives of th plaintiff, and those of the defendant have affets to answer the demand, though the fuits shall abate by the death of the par ties, yet they may be revived against or by the executors (p) being indeed rather actions against the property than the per fon, in which the executors have now the fame interest that their testator had before.

THESE pleas to the jurisdiction, to the disability, or is abatement, were formerly very often used as mere dilator pleas, without any foundation of truth, and calculated only for delay; but now by statute 4 & 5 Ann. c. 16. no dilator plea is to be admitted, without affidavit made of the trut thereof, or some probable matter shewn to the court to induct them to believe it true. And with respect to the pleas them selves, it is a rule, that no exception shall be admitted again a declaration or writ, unless the defendant will in the same plea give the plaintiff a better (q); that is, shew him how might be amended, that there may not be two objections upon the same account.

AL

⁽e) 4 Inft. 315.

⁽p) Mar. 14.

⁽q) Brownl. 139.

П

in

he

tha

on

na

b

e i

hal

re

av

hei 1ry

an

th

th

oar

p)

per

ha

Or

nl or

ut

m

m

00

ALL pleas to the jurisdiction conclude to the cognizance of the court; praying "judgment, whether the court will have farther cognizance of the suit:" pleas to the disability condude to the person; by praying "judgment, if the said A the plaintiff ought to be answered:" and pleas in abatement (when the suit is by original) conclude to the writ or declaration; by praying "judgment of the writ, or declaration, and that the same may be quashed," cassetur, made void, or abated: but, if the action be by bill, the plea must pray "judgment of the bill," and not of the declaration; the bill being here the original, and the declaration only stopy of the bill.

WHEN these dilatory pleas are allowed, the cause is eiter dismissed from that jurisdiction: or the plaintist is stayed ill his disability be removed; or he is obliged to sue out a new writ, by leave obtained from the court (r), or to mend and new frame his declaration. But when on the other hand they are overruled as frivolous, the defendant has independent of respondent ousler, or to answer over in some better manner. It is then incumbent on him to plead.

2. A PLEA to the action; that is, to answer to the merits of the complaint. This is done by confessing or denying it.

A confession of the whole complaint is not very usual, for then the defendant would probably end the matter sooner; or not plead at all, but suffer judgment to go by default. Yet sometimes, after tender and refusal of a debt, if the creditor harasses his debtor with an action, it then becomes necessary for the defendant to acknowledge the debt, and plead the tender; adding that he has always been ready, tout temps will, and still is ready, uncore prist, to discharge it: for a tender by the debtor and refusal by the creditor will in all cases discharge the costs (s), but not the debt itself; though in some particular cases the creditor will totally lose his money.

⁽r) Co. Entr. 271.

⁽s) 1 Ventr. 21.

wer illa

Gebt

et a

ate

lem:

PI

he g

fferi als wilt

n de

imp.

etio

nd i

as I

The

ng s

lecla

near

F

her

gair

ate

ar f

yin

money (t). But frequently the defendant confesses one par of the complaint (by a cognowit actionem in respect thereof) and traverses or denies the rest: in order to avoid the expense of carrying that part to a formal trial, which he has no ground to litigate. A species of this fort of confession is the payment of money into court: which is for the most par necessary upon pleading a tender, and is itself a kind of tender to the plaintiff; by paying into the hands of the proper officer of the court as much as the defendant acknowleges to be due, together with the costs hitherto incurred, in order to prevent the expense of any farther proceedings. This may be done upon what is called a motion; which is an occasional application to the court by the parties or their counsel, in order to obtain some rule or order of court, which becomes necessary in the progress of a cause; and it is usually grounded upon an affidavit, (the perfect tense of the verb affido) being a voluntary oath before fome judge or officer of the court, to evince the truth of certain facts, upon which the motion is grounded: though no fuch affidavit is necessary for payment of money into court. If, after the money paid in the plaintiff proceeds in his fuit, it is at his own peril: for if he does not prove more due than is so paid into court, he shall be nonsuited and pay the defendant costs; but he shall still have the money so paid in, for that the defendant has acknowleged to be his due. In the French law the rule of practice is grounded upon principles fomewhat fimilar to this for there, if a person be sued for more than he owes, yet he loses his cause if he does not tender so much as he really does owe (v). To this head may also be referred the practice of what is called a fet-off: whereby the defendant acknowleges the justice of the plaintiff's demand on the one hand; but on the other, fets up a demand of his own, to counterballance that of the plaintiff, either in the whole or in part : as if the plaintiff sues for ten pounds due on a note of hand the defendant may fet off nine pounds due to himself for merchandize fold to the plaintiff, and, in case he pleads such fet-off, must pay the remaining ballance into court. This anfwers

⁽t) Lit: §. 338. Co. Litt. 209. (v) Sp. L. b. 6. c. 4.

Ch. 20.

r

x-

ias

18

art

n-

per to

to

nay na

in

nes

ded

do

the

the

for

d in

for

, he

hall

ac

0

iis : he

loes

e of

ges

out

bal-

as.

nd

for

uch

an-

rers

very nearly to the compensatio, or stoppage, of the ciilaw (v), and depends on the statutes 2 Geo. II. c. 22. and Geo. II. c. 24. which enact, that, where there are mutual bits between the plaintiff and the defendant, one debt may be against the other, and either pleaded in bar, or given in midence upon the general iffue at the trial; which shall opeate as payment, and extinguish so much of the plaintiff's lemand.

PLEAS, that totally deny the cause of complaint, are either regeneral issue, or a special plea, in bar.

1. THE general issue, or general plea, is what traverses, warts, and denies at once the whole declaration, without firing any special matter whereby to evade it. As in trefas either vi et armis, or on the case, non culpabilis, not milty (u); in debt upon contract, nil debet, he owes nothing; idebt on bond, non eft factum, it is not his deed; on an afmissit, non assumpsit, he made no such promise. Or in real fions, nul tort, no wrong done; nul diffeifin, no diffeifin; din a writ of right, the mise or issue is, that the tenant more right to hold than the demandant has to demand. These pleas are called the general issue, because, by importgan absolute and general denial of what is alleged in the maration, they amount at once to an iffue; by which we tean a fact affirmed on one fide, and denied on the other.

FORMERLY the general iffue was feldom pleaded, except then the party meant wholly to deny the charge alleged sunt him. But when he meant to distinguish away or palate the charge, it was always usual to set forth the particurfacts in what is called a special plea; which was originalintended to apprize the court and the adverse party of the ature and circumstances of the defence, and to keep the wand the fact distinct. And it is an invariable rule, that very defence which cannot be thus specially pleaded, may given in evidence, upon the general iffue at the trial. But,

⁽u) Appendix, No. II. §. 4. (v) Ff. 16. 2. 1.

21

of

bu

da

col

bri

qu

eve

ma

21

wr

eje

pla

tut

un

all

tion

tep

act

wh

WO

inji

ind

tw

one

tim

10

ha

erre

the

dor

enf

COI

But, the science of special pleading having been frequent perverted to the purposes of chicane and delay, the constant have of late in some instances, and the legislature in ma more, permitted the general issue to be pleaded, which least every thing open, the fact, the law, and the equity of case; and have allowed special matter to be given in edence at the trial. And, though it should seem as if mu confusion and uncertainty would follow from so great a laxation of the strictness antiently observed, yet experies has shewn it to be otherwise; especially with the aid of new trial, in case either party be unfairly surprized by other.

2. SPECIAL pleas, in bar of the plaintiff's demand, a very various, according to the circumstances of the defendant's case. As, in real actions a general release or a suboth of which may destroy and bar the plaintiff's title. On personal actions, an accord, arbitration, conditions personal actions, an accord, arbitration, conditions personal actions of the desendant, or some other sact which precludes the plaintiff from his action (w). A justification likewise a special plea in bar; as in actions of assault a battery, son assault demesse, that it was the plaintiff's or original assault; in trespass, that the desendant did the thir complained of in right of some office which warranted him to do; or, in action of slander, that the plaintiff is real as bad a man as the desendant said he was.

ALSO a man may plead the statutes of limitations (x) bar; or the time limited by certain acts of parliament, be yond which no plaintiff can lay his cause of action. The by the statute of 32 Hen. VIII. c. 2. in a writ of right is a years: in assistes, writs of entry, or other possessory action real, of the seisin of one's ancestors, in lands; and either their seisin, or one's own, in rents, suits, and services, suyears: and in actions real for lands grounded upon one own seisin or possession, such possession must have be within thirty years. By statute 1 Mar. st. 2. c. 5. this limitation does not extend to any suit for advowsons, upon realists.

K]

uen

COU

ma lea

of

a e

mu

a

rie

0

y.

1,

lefe

fi

P

whi

tion

t a

0

thi

im

rea

x)

, b

 Γ h

fix

tio

er

one

be

is I

101

raions given in a former chapter (y). But by the statute 11 Jac. I. c. 2. a time of limitation was extended in the case of the king; viz. fixty years precedent to 19 Feb. 1623(2): but, this becoming ineffectual by efflux of time, the same date of limitation was fixed by statute 9 Geo. III. c. 16. to commence and be reckoned backwards, from the time of bringing any fuit or other process, to recover the thing in meltion; to that a possession for fixty years is now a bar men against the prerogative, in derogation of the antient maxim " nullum tempus occurrit regi." By another statute, 11 Jac. I. c. 16. twenty years is the time of limitation in any writ of formadon: and, by a consequence, twenty years is allo the limitation in every action of ejectment; for no sectment can be brought, unless where the lessor of the plaintiff is entitled to enter on the lands (a), and by the statute 21 Jac. I. c. 16. no entry can be made by any man, mless within twenty years after his right shall accrue. As to all personal actions, they are limited by the statute last mentioned to fix years after the cause of action commenced; exupt in some peculiar cases therein specified; and except also actions of affault, battery, mayhem, and imprisonment, which must be brought within four years, and actions for words, which must be brought within two years, after the injury committed. And by the statute 31 Eliz. c. 5. all suits, indictments, and informations, upon any penal statutes, where any forfeiture is to the crown, shall be fued within two years, and where the forfeiture is to a subject, within we year, after the offence committed; unless where any other ime is especially limited by the statute. Lastly, by statute 10 W. III. c. 14. no writ of error, scire facias, or other suit, hall be brought to reverse any judgment, fine, or recovery for tror, unless it be prosecuted within twenty years. Theuse of thefe statutes of limitation is to preserve the peace of the kingdom, and to prevent those innumerable perjuries which might ensue, if a man were allowed to bring an action for an injury ommitted at any diffance of time. Upon both these accounts

⁽y) See page 252. (z) 3 Inst. 189. (a) See page 206.

SP

n th

ment

ed to

to

fue

ore

pon

IT

peci:

ques

Mile

is t

de fi

or fi

nde

ete

en t

amo (a)fir may that mer

the law therefore holds, that "interest reipublicae ut sit sin "litium:" and upon the same principle the Athenian laws i general prohibited all actions, where the injury was committed sive years before the complaint was made (b). I therefore in any suit, the injury, or cause of action, hap pened earlier than the period expressly limited by law, the defendant may plead the statutes of limitations in bar: a upon an assumpsit, or promise to pay money to the plaintiff the defendant may plead non assumpsit infra sex annos; he made no such promise within six years; which is an effectual bar to the complaint.

An estopped is likewise a special plea in bar: which hap pers where a man hath done some act, or executed som deed, which estops or precludes him from averring an thing to the contrary. As if tenant for years (who hath a freehold) levies a fine to another person. Though this is void as to strangers, yet it shall work as an estopped to the cognizor; for, if he afterwards brings an action to recove these lands, and his fine is pleaded against him, he shall thereby be estopped from saying, that he had no freehold a the time, and therefore was incapable of levying it.

The conditions and qualities of a plea (which, as well a the doctrine of estoppels, will also hold equally, mutatis mutandis, with regard to other parts of pleading) are, I. That it be single and containing only one matter, for duplicity begets consustion. But by statute 4 & 5 Ann. c. 16. a may with leave of the court may plead two or more distinct matters or single pleas; as in an action of assault and battery these three, not guilty, son assault demesse, and the statut of limitations. 2. That it be direct and positive, and not are gumentative. 3. That it have convenient certainty of time place, and persons. 4. That it answers the plaintist's allegations in every material point. 5. That it be so pleaded as to be capable of trial.

SPECIAL

in

31

n

an

th

tif

H

u

iap

om

an

n

Si

th

ove

hal

I a

ll a

mu

Tha

cit

mai

nat

tery tut

t ar

ime

ega

as to

IAL

Special pleas are usually in the affirmative, sometimes the negative, but they always advance some new fact not mentioned in the declaration; and then they must be averaged to be true in the common sorm: -- " and this he is ready to verify."--- This is not necessary in pleas of the general sue; those always containing a total denial of the facts before advanced by the other party, and therefore putting him non the proof of them.

iesel by defent and that cheriors he il It is a rule in pleading, that no man be allowed to plead pecially fuch a plea as amounts only to the general iffue, or total denial of the charge; but in fuch case he shall be drien to plead the general iffue in terms, whereby the whole meltion is referred to a jury. But if the defendant, in an the or action of trespass, be desirous to refer the validity of is title to the court rather than the jury, he may state his tiespecially, and at the same time give colour to the plaintiff, rsuppose him to have an appearance or colour of title, bad ideed in point of law, but of which the jury are not comttent judges. As if his own true title be, that he claims by toffment with livery from A, by force of which he entered nthe lands in question, he cannot plead this by itself, as it mounts to no more than the general issue, nul tort, nul difin, in affife, or not guilty in an action of trespass. But he may allege this specially, provided he goes farther and says, hat the plaintiff claiming by colour of a prior deed of feoffnent, without livery, entered; upon whom he entered; and may then refer himself to the judgment of the court which of hele two titles is the best in point of law (c).

When the plea of the defendant is thus put in, if it does amount to an iffue or total contradiction of the declaration, but only evades it, the plaintiff may plead again, and reply to dedefendant's plea: either traversing it, that is, totally denyagit; as if on an action of debt upon bond the defendant leads filvit ad diem, that he paid the money when due, here the

⁽c) Dr. & St. d. 2. c. 53

er in in d

4

É

(pe

the

Irl

m

Hed lang

ne i

pute

les t

ex

plea

a fac

ime testa tion

tefta

fan

ward

lect o

() B

the plaintiff in his replication may totally traverse this plea by denying that the defendant paid it : or he may allege ne matter in contradiction to the defendant's plea; as when the defendant pleads no award made, the plaintiff may reply, an fet forth an actual award, and affign a breach (d): or the re plication may confess and awoid the plea, by some new mat ter or distinction, consistent with the plaintiff's former decla ration; as, in action for trefpaffing upon land whereo the plaintiff is seised, if the defendant shews a title to th land by descent, and that therefore he had a right to enter and gives colour to the plaintiff, the plaintiff may either tra verse and totally deny the fact of the descent; or he ma confess and avoid it, by replying, that true it is that suc descent happened, but that fince the descent the desendan himself demised the lands to the plaintiff for term of life To the replication the defendant may rejoin, or put in an an fwer called a rejoinder. The plaintiff may answer the re joinder by a fur-rejoinder; upon which the defendant ma rebut; and the plaintiff answers him by a fur-rebutter Which pleas, replications, rejoinders, fur-rejoinders, rebut ters, and fur-rebutters answer to the exceptio, replicatio, du plicatio, triplicatio, and quadruplicatio of the Roman laws (e)

THE whole of this process is denominated the pleading; if the several stages of which it must be carefully observed, no to depart or vary from the title or defence, which the part has once insisted on. For this (which is called a departure in pleading) might occasion endless altercation. Therefore the replication must support the declaration, and the rejoinds must support the plea, without departing out of it. As in the case of pleading no award made, in consequence of bond of arbitration, to which the plaintiff replies, setting forth an actual award; now the defendant cannot rejoin that he hath performed this award, for such rejoinder would be an entire departure from his original plea, which alleges that no such award was made: therefore he has now no other choices.

⁽d) Append. No. III. §. 6. (e) Inft. 4. 14. Braet. 1. 5. tr. 5. c. 1

ea

ev

in

re

at

la

eo

th ter

18

na

uc

an

He

an-

re ma

ter

du

(e)

no

art

rei

e th

nde

si

of

tin

ejoi

oul

ege

the

oice

C. 1

nut upon the law of it.

YET in many actions the plaintiff, who has alleged in his duration a general wrong, may in his replication, after an after plea by the defendant, reduce that general wrong to more particular certainty, by affigning the injury afresh, shall its specific circumstances, in such manner as clearly to erain and identify it, consistently with his general commint; which is called a new or novel assignment. As, if the shall in trespass declares on a breach of his close in D, it to have happened is a certain close of pasture in D, which descended to him from B his father, and so is his own shold; the plaintiff may reply and assign another close in specifying the abuttals and boundaries, as the real place the injury (f).

It hath previously been observed (g) that duplicity in pleadmust be avoided. Every plea must be simple, intire, conted, and confined to one fingle point: it must never be angled with a variety of distinct independent answers to the matter; which must require as many different replies, introduce a multitude of issues upon one and the same pute. For this would often embarrass the jury, and someis the court itself, and at all events would greatly enhance expense of the parties. Yet it frequently is expedient plead in fuch a manner, as to avoid any implied admission tact, which cannot with propriety or fafety be positively med or denied. And this may be done by what is called a ufation; whereby the party interposes an oblique alleon or denial of some fact, protesting (by the gerund, usando) that such a matter does or does not exist; and at fame time avoiding a direct affirmation or denial. Sir ward Coke hath defined (h) a protestation (in the pithy th of that age) to be "an exclusion of a conclusion." For the

Bro. Abr. t. trespass. 205. 28 4.

I

he who

ner,

by f

bray her

"th

B

fp

hat

er;

n a

wa

t do

dair

but

tend plea and

of th

the use of it is, to save the party from being concluded w respect to some fact or circumstance, which cannot be rectly affirmed or denied without falling into duplicity of ple ing; and which yet, if he did not thus enter his proteft, might be deemed to have tacitly waived or admitted. The while tenure in villenage subsisted, if a villein had broug an action against his lord, and the lord was inclined to try merits of the demand, and at the fame time to prevent a conclusion against himself that he had waived his fignion he could not in this case both plead affirmatively that the plain tiff was his villein, and also take issue upon the demand; then his plea would have been double, as the former alo would have been a good bar to the action: but he mis have alleged the villenage of the plaintiff, by way of prot tation, and then have denied the demand. By this mea the future vassalage of the plaintiff was faved to the defe dant, in case the issue was found in his (the defendant favour (i): for the protestation prevented that conclude which would otherwise have resulted from the rest of defence, that he had enfranchised the plaintiff (k); since villein could maintain a civil action against his lord. So a if a defendant, by way of inducement to the point of defence, alleges (among other matters) a particular mo of feifin or tenure, which the plaintiff is unwilling to adm and yet defires to take iffue on the principal point of the fence, he must deny the seisin or tenure by way of protes tion, and then traverse the defensive matter. So, lastly, if award be fet forth by the plaintiff, and he can affign a brea in one part of it (viz. the non-payment of a fum of mone and yet is afraid to admit the performance of the rest of award, or to aver in general a non-performance of any p of it, lest fomething should appear to have been performe he may fave to himself any advantage he might hereafter ma of the general non-performance, by alleging that by protes tion; and plead only the non-payment of the money (1).

⁽i) Co. Litt. 126. (l) Append. No. III. §. 6.

⁽k) See book II, ch. 6. page 9

lea

t,

h

ug

y t

ior

la

;

alo

nig

rot

nea efe

int

ufid

f

ce

o a

f

mo

dm

ie d

tef

if

rea

one

of t

p

me

ma tef

9

In any stage of the pleadings, when either side advances raffirms any new matter, he usually (as was said) avers it to etue; "and this he is ready to verify." On the other and, when either side traverses or denies the facts pleaded in his antagonist, he usually tenders an issue, as it is called; he language of which is different according to the party by shom the issue is tendered; for if the traverse or denial mass from the defendant, the issue is tendered in this manter, "and of this he puts himself upon the country," there-by submitting himself to the judgment of his peers (m): but stee traverse lies upon the plaintist, he tenders the issue or mays the judgment of the peers against the defendant in another form; thus, "and this he prays may be enquired of by the country."

But if either fide (as, for instance, the defendant) pleads special negative plea, not traversing or denying any thing hatwas before alleged, but disclosing some new negative matr; as there the fuit is on a bond, conditioned to perform naward, and the defendant pleads, negatively, that no ward was made, he tenders no issue upon this plea; because tdoes not yet appear whether the fact will be disputed, the laintiff not having yet afferted the existence of any award; at when the plaintiff replies, and fets forth an actual specitraward, if then the defendant traverses the replication, and tenies the making of any such award, he then and not before anders an iffue to the plaintiff. For when in the course of leading they come to a point which is affirmed on one fide, ad denied on the other, they are then faid to be at iffue; all birdebates being at last contracted into a fingle point, which must now be determined either in favour of the plaintiff or of the defendant.

(m) Append. No. 11. §. 4.

a t

me « E

ed,

jud

pal

Lat

of d

in f

mar

que

deci

CHAPTER THE TWENTY FIRST.

Lained to chargest out to soft a herology on soft sit, on

e carrell lies upointing paintiff, he prodoes the islim are the factoring to the definition in a car-

ville bearing so that every sil the burn such

and the soline of the state of the state of the soline solutions of the solutions of the state of the solutions of the state of the solutions of the solutions

OF ISSUE AND DEMURRER.

I SSUE, exitus, being the end of all the pleadings, is the fourth part or stage of an action, and is either upon matter of law, or matter of fact.

An iffue upon matter of law is called a demurrer: and i confesses the fact to be true, as stated by the opposite party but denies that, by the law arifing upon those facts, any in jury is done to the plaintiff, or that the defendant has mad out a legitimate excuse; according to the party which fir demurs, demoratur, rests or abides upon the point in question As, if the matter of the plaintiff's complaint or declaration be infufficient in law, as by not affigning any fufficient trel pass, then the defendant demurs to the declaration: if, on the other hand, the defendant's excuse or plea be invalid, as i he pleads that he committed the trespass by authority from ftranger, without fetting out the ftranger's right; here th plaintiff may demur in law to the plea; and fo on in ever other part of the proceedings, where either fide perceives an material objection in point of law, upon which he may re his cafe.

THE form of fuch demurrer is by averring the declaration of plea, the replication or rejoinder, to be infusficient in law to maintain

II

th

nat.

nd i

rtv

y in

nad

fir

tion

atio

tref

n th

as i

om

e th

an

rel

n o

w to

tail

mintain the action or the defence; and therefore praying indepent for want of sufficient matter alleged (a). Sometimes hemurers are merely for want of sufficient form in the write declaration. But in case of exceptions to the form, or manner of pleading, the party demurring must by statute 27 liz. c. 5. and 4 & 5 Ann. c. 16. set forth the causes of his hemurrer, or wherein he apprehends the deficiency to consist. And upon either a general, or such a special demurrer, the opposite party avers it to be sufficient, which is called a joint in demurrer (b), and then the parties are at issue in point of law. Which issue in law, or demurrer, the judges of the our before which the action is brought must determine.

An iffue of fact is where the fact only, and not the law, sdisputed. And when he that denies or traverses the fact headed by his antagonist has tendered the issue, thus " and "this he prays may be enquired of by the country," or "and of this he puts himself upon the country," it may imnediately be subjoined by the other party, " and the said A. B. doth the like." Which done, the iffue is faid to be joind, both parties having agreed to rest the fate of the cause mon the truth of the fact in question (c). And this issue, of fact, must generally speaking be determined, not by the idges of the court, but by some other method; the princial of which methods is that by the country, per pais, (in latin, per patriam) that is, by jury. Which establishment. different tribunals for determining these different issues, is a some measure agreeable to the course of justice in the Ronan Republic, where the judices ordinarii determined only putions of fact, but questions of law were referred to the decisions of the centumviri (d).

But here it will be proper to observe, that during the whole of these proceedings, from the time of the defendant's appearance in obedience to the king's writ, it is necessary that both the parties

⁽a) Append. No. III. §. 6. (b) Ibid. (c) Append. No. II. 4 (d) Cic. de Orator, i. 1. c. 38.

fen

ho

the

aud

rein

of .

1

析

dete

mer

600

whi

calle

The in th

to th

and

pray man all e

er,

T

ceed

men

barb

own

(e

parties be kept or continued in court from day to day, till t final determination of the fuit. For the court can determin nothing, unless in the presence of both the parties, in perso or by their attornies, or upon default of one of them, aft his original appearance and a time prefixed for his appearan in court again. Therefore in the course of pleading, either party neglects to put in his declaration, plea, replica tion, rejoinder, and the like, within the times allotted by the standing rules of the court, the plaintiff, if the omission b his, is faid to be nonfuit, or not to follow and pursue his com plaint, and shall lose the benefit of his writ : or, if the ne gligence be on the fide of the defendant, judgment may h had against him, for such his default. And, after iffue or de murrer joined, as well as in some of the previous stages of proceeding, a day is continually given and entered upon th record, for the parties to appear on from time to time, as th exigence of the case may require. The giving of this day called the continuance, because thereby the proceedings ar continued without interruption from one adjournment to and ther. If these continuances are omitted the cause is thereb discontinued, and the defendant is discharged fine die, with out a day, for this turn: for by his appearance in court h has obeyed the command of the king's writ; and unless h be adjourned over to a day certain, he is no longer bound to attend upon that fummons; but he must be warned afresh and the whole must begin de novo.

Now it may fometimes happen, that after the defendar has pleaded, nay, even after iffue or demurrer joined, then may have arisen some new matter, which it is proper so the defendant to plead; as, that the plaintiff, being a seme sole, is since married, or that she has given the defendant a release, and the like: here, if the defendant takes advantage of this new matter, as early as he possibly can, viz at the day given for his next appearance, he is permitted to plead it in what is called a plea puis darrein continuance or since the last adjournment. For it would be unjust to exclude him from the benefit of this new defence, which

H

t

ni

ríd

ft

and

,

ica

th

1 8

om

ne y b

de s o

th

ly

an

ind

eb

t h

sh

d t

efh

lan ner

fo

me

lan

an

112

tte

nce

ic

But it is dangerous to rely on such a plea, without due conideration; for it confesses the matter which was before in institute between the parties (e). And it is not allowed to be put in, if any continuance has intervened between the arising of this fresh matter and the pleading of it: for then the deindant is guilty of neglect, or laches, and is supposed to reiyon the merits of his former plea. Also it is not allowed after a demurrer is determined, or verdict given; because then relief may be had in another way, namely, by writ of maita querela, of which hereafter. And these pleas puis darnin continuance, when brought to a demurrer in law or issue of fact, shall be determined in like manner as other pleas.

We have said, that demurrers, or questions concerning the spriency of the matters alleged in the pleadings, are to be determined by the judges of the court, upon solemn argument by counsel on both sides; and to that end a demurrer book is made up, containing all the proceedings at length, which are afterwards entered on record, and copies thereof, alled paper-books, are delivered to the judges to peruse. The record (f), is a history of the most material proceedings in the cause, entered on a parchment roll, and continued down to the present time; in which must be stated the original write and summons, all the pleadings, the declaration, view or over payed, the imparlances, plea, replication, rejoinder, continuances, and whatever farther proceedings have been had; if entered verbatim on the roll, and also the issue or demurant, and joinder therein.

THESE were formerly all written, as indeed all public promedings were, in Norman or law French, and even the arguments of the counsel and decisions of the court were in the same harbarous dialect. An evident and shameful badge, it must be wired, of tyranny and foreign servitude; being introduced O 3 under

⁽e) Cro. Eliz. 49. (f) Append. Nc. II. §. 4. No. III. §. 6.

m

ên

tu

WC

im

or

WC

fpr

nat

fwe

and

(if

cal

the

ple

law

are

per

beer

ther

to n

que thro

under the auspices of William the Norman, and his son whereby the observation of the Roman satyrist was once mo verified, that "Gallia causidicos docuit facunda Britannos (g) This continued till the reign of Edward III; who, having employed his arms successfully in subduing the crown France, thought it unbeseeming the dignity of the victors use any longer the language of a vanquished country. By statute therefore, passed in the thirty fixth year of his reis (h), it was enacted, that for the future all pleas should pleaded, shewn, defended, answered, debated, and judg in the English tongue; but be entered and enrolled in Lati In like manner as don Alonso X. king of Castile (the gre grandfather of our Edward III) obliged his subjects to u the Castilian tongue in all legal proceedings (i); and as, i 1280, the German language was established in the courts the empire (k). And perhaps if our legislature had thend rected that the writs themselves, which are mandates fro the king to his subjects to perform certain acts or to appear certain places, should have been framed in the English la guage, according to the rule of our antient law (1), it had no been very improper. But the record or enrollment of the writs and the proceedings thereon, which was calculated for the benefit of posterity, was more serviceable (because mo durable) in a dead and immutable language than in any fu or living one. The practifers however, being used to the No man language, and therefore imagining they could express the thoughts more aptly and more concisely in that than in any other still continued to take their notes in law French; and of cour when those notes came to be published, under the denomin tion of reports, they were printed in that barbarous dialed which, joined to the additional terrors of a Gothic black lette has occasioned many a student to throw away his Plowdena Littleton, without venturing to attack a page of them. As yet in reality, upon a nearer acquaintance, they would ha found nothing very formidable in the language; which diffe

⁽g) Juv. xv. 111. (h) c. 15. (i) Mod. Un. Hift, xx, 21 (k) Ibid. xxix. 235. (l) Mirr. c. 4. § 3.

II

one

mo

g).

VII

n

By

reig

ld

dg

atu

gre o u

s, i

en d

fro

ar

la

l n

tho

d fo

mo

fly

No

the

the

our

nin

lec

ette

nat

A

ha

iffe

24

french, as the diction of Chaucer and Gower does from that of Addison and Pope. Besides, as the English and Norman languages were concurrently used by our ancestors for several centuries together, the two idioms have naturally assimilated, and mutually borrowed from each other: for which reason the grammatical construction of each is so very much the same, that I apprehend an Englishman (with a week's preparation) would understand the laws of Normandy, collected in their grand custumier, as well if not better than a Frenchman bred within the walls of Paris.

THE Latin, which succeeded the French for the entry and prollment of pleas, and which continued in use for four cenbries, answers so nearly to the English (oftentimes word for word) that it is not at all furprizing it should generally be magined to be totally fabricated at home, with little more art or trouble than by adding Roman terminations to English words. Whereas in reality it is a very universal dialect, pread throughout all Europe at the irruption of the northern nations, and particularly accommodated and moulded to anwer all the purposes of the lawyers with a peculiar exactness and precision. This is principally owing to the simplicity or If the reader pleases) the poverty and baldness of its texture, alculated to express the ideas of mankind just as they arise in the human mind, without any rhetorical flourishes, or perplexed ornaments of style: for it may be observed, that those laws and ordinances, of public as well as private communities, are generally the most easily understood, where strength and propicuity, not harmony or elegance of expression, have ben principally confulted in compiling them. These northem nations, or rather their legislators, though they resolved make use of the Latin tongue in promulging their laws, as being more durable and more generally known to their conquered subjects than their own Teutonic dialects, yet (either brough choice or necessity) have frequently intermixed therein bme words of a Gothic original; which is, more or less, the

qu

By

for

to a fer bier

ten Th

WO

An

that

unc

phil

and

Sir

not

(p

117,

18. 6

case in every country of Europe, and therefore not to be in puted as any peculiar blemish in our English legal latini (m). The truth is, what is generally denominated law-lat is in reality a mere technical language, calculated for etern duration, and easy to be apprehended both in present and sture times; and on those accounts best suited to preserve the memorials which are intended for perpetual rules of action. The rude pyramids of Eygypt have endured from the earlier ages, while the more modern and more elegant structures of Attica, Rome, and Palmyra, have sunk beneath the stroke of time.

As to the objection of locking up the law in a strange an unknown tongue, this is of little weight with regard to records, which few have occasion to read but such as do, o ought to, understand the rudiments of Latin. And besides may be observed of the law-latin, as the very ingenious such John Davies (n) observes of the law-French, "that it is surely easy to be learned, that the meanest wit that every came to the study of the law doth come to understand a sum of perfectly in ten days without a reader."

It is true indeed that the many terms of art, with which the law abounds, are fufficiently harsh when latinized (you not more so than those of other sciences), and may, as Mr Selden observes (o), give offence "to some grammarians of squeamish stomachs, who would rather choose to live in igno rance of things, the most useful and important, than to have their delicate ears wounded by the use of a word, use their delicate ears wounded by the use of a word, use "known to Cicero, Sallust, or the other writers of the Augustan age." Yet this is no more than must unavoid ably happen when things of modern use, of which the Romans had no idea, and consequently no phrases to express them.

⁽m) The following sentence, "fi quis ad battalia curte sua ex "ierit, if any one goes out of his own court to fight," &c. ma raise a smile in the student as a staming modern anglicism; but he may meet with it, among others of the same stamp, in the laws of the Burgundians on the continent, before the end of the fifth century. (Add. 1. c. 5. §. 2.) (n) Pref. Rep. (o) Pref. ad Eadmer.

II

in

ni

lat

rn

1 fi

ho

tio

rlie

es

ce d

an

o r

),

des us f

is

ev

nd

hid

(y

M

ns d

gno

hav

un th

roid

th

ore

nen

z ex

ma at h

WS

cer

men

hem, come to be delivered in the Latin tongue. It would nuzle the most classical scholar to find an appellation, in his oure latinity, for a constable, a record, or a deed of feoffment: it is therefore to be imputed as much to necessity as morance, that they were styled in our forensic dialect constaharius, recordum, and feoffamentum. Thus again, another mouth word of our antient laws (for I defend not the ridicubus barbarisms sometimes introduced by the ignorance of mdern practifers) the substantive murdrum, or the verb murbare, however harsh and unclassical it may seem, was necesanly framed to express a particular offence; since no other word in being, occidere, interficere, necare, or the like, was afficient to express the intention of the criminal, or quo animo meact was perpetrated; and therefore by no means came up to the notion of murder at present entertained by our law; wiz. a killing with malice aforethought.

ASIMILAR necessity to this produced a fimilar effect at Byzantium, when the Roman laws were turned into Greek for the use of the oriental empire: for, without any regard hAttic elegance, the lawyers of the imperial courts made no fruple to translate fidei-commissarios, pideixoppus apies (p); cuhulum, инвыкльног (q); filium-fimilias, таква фариклаς (r); thudium, perudior (s); compromissum, nourpopulator (t); revetentia et obsequium, peuseerria nai ocosnusion (u); and the like. They studied more the exact and precise import of the words, than the neatness and delicacy of their cadence. And my accademical readers will excuse me for suggesting, that the terms of the law are not more numerous, more mouth, or more difficult to be explained by a teacher, han those of logic, physics, and the whole circle of Aristotle's philosophy, nay even of the politer arts of architecture and its kindred studies, or the science of rhethoric itself. Sir Thomas More's famous legal question (w) contains in it nothing more difficult, than the definition which in his time

⁽p) Nov. 1. c. 1. (q) Nov. 8. edi A. Constantinop. (r) Nov. 117. c. 1. (s) Ibid. c. 8. (t) Nov. 82. c. 11. (u) Nov. 18. c. 2. (w) See pag. 149.

00

fe

pr

in

ot

B

ce

ni «

16

di

1

time the philosophers currently gave of their materia prime the groundwork of all natural knowledge; that it is "neque quaid, neque quantum, neque quale, neque aliquid eorum que bus ens determinatur;" or its subsequent explanation be Adrian Heereboord, who assures us (x), that "materia prime" non est corpus, neque per formam corporeitatis, neque per sime plicem essentiam: est tamen ens, et quidem substantia, licet in "completa; babetque actum ex se entitativum, et simul est per tentia subjectiva." The law therefore, with regard to it technical phrases, stands upon the same footing with other studies, and requests only the same indulgence.

THIS technical Latin continued in use from the time its first introduction, till the subversion of our antient const tution under Cromwell; when, among many other innova tions in the law, some for the better and some for the world the language of our records was altered and turned into En glish. But, at the restoration of king Charles, this novel was no longer countenanced; the practifers finding it ve difficult to express themselves so concisely or significantly any other language but the Latin. And thus it continue without any sensible inconvenience till about the year 173 when it was again thought proper that the proceedings at la should be done into English, and it was accordingly so orde ed by ftatute 4 Geo. II. c. 26. This was done, in order th the common people might have knowledge and understanding of what was alleged or done for and against them in the pr cess and pleadings, the judgment and entries in a cause. Which purpose I know not how well it has answered; but am apt fuspect that the people are now, after many years expen ence, altogether as ignorant in matters of law as before. O the other hand, these inconveniences have already arisen fro the alteration; that now many clerks and attorneys are hard able to read, much less to understand, a record even of modern a date as the reign of George the first. Andith much enhanced the expence of all legal proceedings: for fine

⁽x) Philosoph. natural. c. 1. §. 28, &c.

II

im

regi

qu

n H

rin

fin

et i

A p

to i

oth

le i

nft

orl

E

vel

ver

y

nue

73 t la

rde

th

dir

pro hic

pt t

. 0

fro

ard

of th

fine

the practifers are confined (for the sake of the stamp duties, which are thereby considerably encreased) to write only a stated number of words in a sheet; and as the English language, through the multitude of its particles, is much more verboss than the Latin; it follows that the number of sheets must be very much augmented by the change (y). The translation also of technical phrases, and the names of writs and other process, were found to be so very ridiculous (a writ of insprius, quare impedit, sieri facias, habeas corpus, and the rest, not being capable of any English dress with any degree of seriousness that, in two years time a new act was obliged to be made, 6 Geo. II. c. 14, which allows all technical words to continue in the usual language, and has thereby almost desated every beneficial purpose of the former statute.

What is said of the alteration of language by the statute 4Geo. II. c. 26. will hold equally strong with respect to the prohibition of using the antient immutable court hand in writing the records or other legal proceedings; whereby the reading of any record that is forty years old is now become the object of science, and calls for the help of an antiquarian. But that branch of it, which forbids the use of abreviations, seems to be of more solid advantage, in delivering such proceedings from obscurity: according to the precept of Justinian (z); "ne per scripturam aliqua siat in posterum dubitatio, "jubemus non per siglorum captiones et compendiosa aenigmata "ejusdem codicis textum conscribi, sed per literarum consequen-"tiam explanari concedimus." But, to return to our demurrer.

When the substance of the record is completed, and copies are delivered to the judges, the matter of law, upon which the demurrer is grounded, is upon solemn argument determined by the court, and not by any trial by jury; and judgment is

⁽y) For instance, these three words, "fecundum formam statuti," are now converted into seven, according to the form of the state," (z) De concept. digest. §. 13.

thereupon accordingly given. As, in an action of trespass if the defendant in his plea confesses the fact, but justifies it causa venationis, for that he was hunting; and to this the plaintiff demurs, that is, he admits the truth of the plea but denies the justification to be legal: now, on arguing this demurrer, if the court be of opinion, that a man may not justify trespass in hunting, they will give judgment for the plaintiff; if they think that he may, then judgment is given for the defendant. Thus is an issue in law, or demurrer, disposed of.

An iffue of fact takes up more form and preparation to fettle it; for here the truth of the matters alleged must be folemnly examined in the channel prescribed by law. To which examination, of facts, the name of trial is usually confined, which will be treated of at large in the two succeeding chapters.

CHAPTER

opo the

01

tauf

er c

ndu!

afs es i th

thin no the iver

rer

n t

T

all

uc-

CHAPTER THE TWENTY SECOND.

OF THE SEVERAL SPECIES OF TRIAL.

THE uncertainty of legal proceedings is a notion fo generally adopted, and has so long been the standing teme of wit and good humour, that he who should attempt to refute it, would be looked upon as a man, who was either mapable of discernment himself, or else meant to impose monothers. Yet it may not be amiss, before we enter upon the several modes whereby certainty is meant to be obtained hour courts of justice, to enquire a little wherein this uncerainty, so frequently complained of, consists; and to what must it owes its original.

In hath sometimes been said to owe its original to the number of our municipal constitutions, and the multitude of our municipal constitutions, and the multitude of our municipal decisions (a); which occasion, it is alleged, abundance of rules that militate and thwart with each other, as the miniments or caprice of successive legislatures and judges, are happened to vary. The fact, of multiplicity, is alwed; and that thereby the researches of the student are modered more difficult and laborious: but that, with proper dustry, the result of those enquiries will be doubt and medicision, is a consequence that cannot be admitted. Peode are apt to be angry at the want of simplicity in our minimum six; they mistake variety for confusion, and complicated also for contradictory. They bring us the examples of arbitrary

(4) See the Preface to Sir John Davie's reports; wherein many of a following to ricks are discussed more at large.

me

bu

an

pri

an

lar

law

cel

lav

COI

the

H

tee

the

pro

of

us

MO

Wi.

be

in

ma

car

arbitrary governments, of Denmark, Muscovy and Prussia of wild and uncultivated nations, the savages of Africa, an America; or of narrow domestic republicks, in antient Greed and modern Switzerland; and unreasonably require the sam paucity of laws, the same conciseness of practice, in a natio of freemen, a polite and commercial people, and a populou extent of territory.

In an arbitrary, despotic government, where the land are at the disposal of the prince, the rules of succession, the mode of enjoyment, must depend upon his will and plea fure. Hence there can be but few legal determinations re lating to the property, the descent, or the conveyance real estates; and the same holds in a stronger degree wit regard to goods and chattels, and the contracts relatin thereto. Under a tyrannical fway trade must be continually jeopardy, and of consequence can never be extensive: th therefore puts an end to the necessity of an infinite number rules, which the English merchant daily recurs to for adjustin commercial differences. Marriages are there usually con tracted with flaves; or at least women are treated as such no laws can be therefore expected to regulate the rights dower, jointures, and marriage settlements. Few also a the persons who can claim the privileges of any laws: t bulk of those nations, viz. the commonalty, boors, or pe fants, being merely villeins and bondmen. Those are ther fore left to the private coercion of their lords, are efteem (in the contemplation of these boasted legislators) incapable either right or injury, and of consequence are entitled to redress. We may see, in these arbitrary states, how large field of legal contests is already rooted up and destroyed.

AGAIN; were we a poor and naked people, as the favages America are, strangers to science, to commerce, and the arts well of convenience as of luxury, we might perhaps be content, as some of them are said to be, to refer all disputes to the next man we met upon the road, and so put a short end to even contract.

the party of the contract of the contract of

San a tar out had being a to the tar san and

ed

m

io

ou

nd

lea

re

2 (

WI

tin

ly

th er

ftin

cor

uch

ts

) a

t

pe

her

em

ole

0

rge

1.

res

rts

co

tot

eve

ntr

controversy. For in a state of nature there is no room for municipal laws; and the nearer any nation approaches to that state, the sewer they will have occasion for. When the people of Rome were little better than sturdy shepherds or herdstan, all their laws were contained in ten or twelve tables: but as luxury, politeness, and dominion increased, the civil law increased in the same proportion, and swelled to that amazing bulk which it now occupies, though successively puned and retrenched by the emperors Theodosius and Justinian.

In like manner we may lastly observe, that, in petty states and narrow territories, much sewer laws will suffice than in large ones, because there are sewer objects upon which the laws can operate. The regulations of a private family are short and well known; those of a prince's houshold are ne-castrily more various and dissuse.

THE causes therefore of the multiplicity of the English laws are, the extent of the country which they govern; the ommerce and refinement of its inhabitants; but, above all, the liberty and property of the subject. These will naturally produce an infinite fund of disputes, which must be terminated in a judicial way: and it is effential to a free people, that these determinations be published and adhered to; that their property may be as certain and fixed as the very constitution of their state. For though in many other countries-every ting is left in the breast of the judge to determine, yet with is he is only to declare and pronounce, not to make or newmodel, the law. Hence a multitude of decisions, or cases adjudged, will arise; for seldom will it happen that any one rule will exactly fuit with many cases. And in proportion as the decisions of courts of judicature are multiplied, the law will beloaded with decrees, that may sometimes (though rarely) interfere with each other: either because succeeding judges may not be apprized of the prior adjudication; or because they may think differently from their predecessors; or because the same arguments did not occur formerly as at prefent;

2S]

con

owi

vey hefi

frec the

tena

and

con for

difp lari

dar

B

verf.

wilf

poit

neft

geft biir

as a

fent; or, in fine, because of the natural imbecility and im perfection that attends all human proceedings. But, where ever this happens to be the case in any material point, the legislature is ready, and from time to time both may, an frequently does, intervene to remove the doubt; and, upo due deliberation had, determines by a declaratory statute ho the law shall be held for the future.

WHATEVER instances therefore of contradiction or un certainty may have been gleaned from our records, or reports must be imputed to the defects of human laws in genera and are not owing to any particular ill construction of the En glish system. Indeed the reverse is most strictly true. The English law is less embarrassed with inconsistent resolution and doubtful questions, than any other known system of the fame extent and the fame duration. I may instance in the civil law: the text whereof, as collected by Justinian and hi agents, is extremely voluminous and diffuse; but the id comments, obscure glosses, and jarring interpretations grafts thereupon by the learned jurists, are literally without numbe And these glosses, which are mere private opinions of scho lastic doctors (and not, like our books of reports, judicia determinations of the court) are all of authority sufficient be vouched and relied on; which must needs breed great di traction and confusion in their tribunals. The fame may b faid of the canon law; though the text thereof is not of ha the antiquity with the common law of England; and thoug the more antient any fystem of laws is, the more it is liab to be perplexed with the multitude of judicial decrees. Whe therefore a body of laws, of so high antiquity as the English is in general fo clear and perspicuous, it argues deep wisdon and forefight in such as laid the foundations, and great car and circumspection, in such as have built the superstructure

But is not (it will be asked) the multitude of lawfuits, which we daily fee and experience, an argument against the clearne and certainty of the law itself? By no means: for among the variou

III

here

, th

an

upo ho

un

era

En

Th

tion

f th

th

l h

id

ifte

be

ho

icia

t t

di

y b

hal

ug

abl

he

iA

or

ai

re

arious disputes and controversies, which are daily to be met min the course of legal proceedings, it is obvious to observe low very few arise from obscurity in the rules or maxims of w. An action shall seldom be heard of, to determine a question of inheritance, unless the fact of the descent be congyerted. But the dubious points, which are usually agitadin our courts, arise chiefly from the difficulty there is of fertaining the intentions of individuals, in their folemn difmitions of property; in their contracts, conveyances, and thaments. It is an object indeed of the utmost importance this free and commercial country, to lay as few restraints spossible upon the transfer of possessions from hand to hand, their various defignations marked out by the prudence, movenience, or necessities, or even by the caprice, of their wners: yet to investigate the intention of the owner is frequently matter of difficulty, among heaps of entangled conreyances or wills of a various obscurity. The law rarely whates in declaring its own meaning: but the judges are frequently puzzled to find out the meaning of others. the powers, the interest, the privileges, and properties of a mant for life, and a tenant in tail, are clearly distinguished and precisely settled by law: but, what words in a will shall mustitute this or that estate, has occasionally been disputed for more than two centuries past; and will continue to be diputed as long as the carelessness, the ignorance, or fingubrity of testators shall continue to cloth their intentions in dark or new-fangled expressions.

But, notwithstanding so vast an accession of legal controresses, arising from so fertile a fund as the ignorance and
wisulness of individuals, these will bear no comparison in
point of number to those which are founded upon the dishonest, and dsingenuity of the parties: by either their suggesting complaints that are false in fact, and thereupon
hinging groundless actions; or by their denying such facts
are true, in setting up unwarrantable defences. Ex facto
with jus: if therefore the fact be perverted or mis-represented, the law which arises from thence will unavoidably
be unjust or partial. And, in order to prevent this, it is ne-

no fi

ord

ollr

nit

s n

ury

reco

And

CIC

I

ceffary to fet right the fact, and establish the truth contended for, by appealing to some mode of probation or truth which the law of the country has ordained for a criterion truth and falshood.

THESE modes of probation or trial form in every civilization to the great object of judicial decisions. And expense will abundantly shew, that above a hundred of a lawfuits arise from disputed facts, for one where the law doubted of. About twenty days in the year are sufficient, Westminster hall, to settle (upon solemn argument) every a murrer or other special point of law that arises through the nation: but two months are annually spent in deciding the truth of facts, before six distinct tribunals, in the seven circuits of England; exclusive of Middlesex and Londowhich afford a supply of causes much more than equivalent to any two of the largest circuits.

TRIAL then is the examination of the matter of fact in fue; of which there are many different species, according the difference of the subject, or thing to be tried: of a which we will take a cursory view in this and the subseque chapter. For the law of England so industriously endeavou to investigate truth at any rate, that it will not confine its to one, or to a few, manners of trial; but varies its examnation of facts according to the nature of the facts then selves: this being the one invariable principle pursued, the as well the best method of trial, as the best evidence upon that trial, which the nature of the case affords, and no other shall be admitted in the English courts of justice.

THE species of trials in civil cases are seven. By record by inspection, or examination; by certificate; by witnesses by wager of law; and by jury.

I. FIRST then of the trial by record. This is only used one particular instance: and that is where a matter of record pleade

tr

n

li.

pe

A1E

nt,

y d

ho

di

ve

dd

ale

in

19

f

jue

rou its

am

len

th

upd

he

ord

d

rd

de

haded in any action, as a fine, a judgment, or the like; the opposite party pleads ,, nul tiel record," that there is nfuch matter of record existing : upon this, issue is tendered ad joined in the following form, " and this he prays may the enquired of by the record, and the other doth the like :" of hereupon the party pleading the record has a day given in to bring it in, and proclamation is made in court for into "bring forth his record or he shall be condemned;" nd, on his failure, his antagonist shall have judgment to reover. The trial therefore of this issue is merely by the remd; for, as fir Edward Coke (b) observes, a record or enplment is a monument of fo high a nature, and importeth itself such absolute variety, that if it be pleaded that there no fuch record, it shall not receive any trial by witness, iry, or otherwise, but only by itself. Thus titles of nobiby, as whether earl or no earl, baron or no baron, shall be tied by the king's writ or patent only, which is matter of mord (c). Also in case of an alien, whether alien friend renemy, shall be tried by the league or treaty between his brereign and ours; for every league or treaty is of record (d). and also, whether a manor be held in antient demesne anot, shall be tried by the record of domesday, in the king's achequer.

II. TRIAL by inspection, or examination, is when for the greater expedition of a cause, in some point or issue being other the principal question, or arising collaterally out of it, but being evidently the object of sense, the judges of the wort, upon the testimony of their own senses, shall decide the point in dispute. For, where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it; who are properly called in to inform the conscience of the court in respect of dubious sacts: and therefore when the fact, som its nature, must be evident to the court, either from scalar demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men,

A

cb

III

739

tion

ge (

and relies on the judgment of the court alone. As in case a fuit to reverse a fine for non-age of the cognizor, or to aside a statute or recognizance entered into by an infant; he and in other cases of the like fort, a writ shall iffue to theriff (e), commanding him that he constrain the faid pa to appear, that it may be ascertained by the view of his dy by the king's justices, whether he be of full age or no " ut per aspectum corporis sui constare poterit justiciariis noste " si praedictus A sit plenae aetatis, necne (f)." If howe the court has, upon inspection, any doubt of the age of party, (as may frequently be the case) it may proceed to ta proofs of the fact; and, particularly, may examine the fant himself upon an oath of voir dire, veritatem dicere, the is, to make true answer to such questions as the court sh demand of him: or the court may examine his mother, god-father, or the like (g).

In like manner if a defendant pleads in abatement of the fuit that the plaintiff is dead, and one appears and calls his felf the plaintiff, which the defendant denies; in this can the judges shall determine by inspection and examination whether he be the plaintiff or not (h). Also if a man found by a jury an idiot a nativitate, he may come in performing the part of the chancery before the chancellor, or be broug there by his friends, to be inspected and examined, whether ideot or not: and if, upon such view and enquiry, it a pears he is not so, the verdict of the jury, and all the proceedings thereon, are utterly void and instantly of no effect (in the sum of the

ANOTHER instance in which the trial by inspection may used, is when, upon an appeal of maihem, the issue joined whether it be maihem or no maihem, this shall be decided the court upon inspection; for which purpose they may call

⁽e) 9 Rep. 31. (f) This question of non-age was former according to Glanvil, (l. 13. c. 15.) tried by a jury of eight me though now it is tried by inspection. (g) 2 Roll, Abr. 57 (h) 9 Rep. 30. (i) Ibid. 31.

1. 22.

afe

to he

0

pa

s l

ve

f

e i

, th

fh

r, 1

ft

hin

ca

tio

n

ug

wh

t a

pr

1 (1

y

ed

dl

11

t

er

ne

57

fishence of surgeons (j). And, by analogy to this, in an so of trespass for maihem, the court, (upon view of such the mass as the plaintiff has laid in his declaration, or which the entired by the judges who tried the cause to be the same was given in evidence to the jury) may increase the dawes at their own discretion (k); as may also be the case upview of an atrocious battery (l). But then the battery of likewise be alleged so certainly in the declaration, that may appear to be the same with the battery inspected.

ALSO, to ascertain any circumstances relative to a particular past, it hath been tried by an inspection of the almarchy the court. Thus, upon a writ of error from an infercourt, that of Lynn, the error assigned was, that the algorithm was given on a Sunday, it appearing to be on 26 bruary, 26 Eliz. and upon inspection of the almanacks of at year it was found that the 26th of February in that year hally fell upon a Sunday: this was held to be a sufficient al, and that a trial by a jury was not necessary, although was an error in fact; and so the judgment was reversed.

But, in all these cases, the judges, if they conceive a subt, may order it to be tried by jury.

III. THE trial by certificate is allowed in such cases, where evidence of the person certifying is the only proper critemost the point in dispute. For, when the fact in question sout of the cognizance of the court, the judges must rely the solemn averment or information of persons in such a mion, as affords them the most clear and competent knowes of the truth. As therefore such evidence (if given to a must have been conclusive, the law, to save trouble directly, permits the fact to be determined upon such the state merely. Thus, 1. If the issue be whether A was sent with the king in his army out of the realm in time war, this shall be tried (n) by the certificate of the mareschal

⁽i) 2 Roll. Abr. 578. (k) 1 Sid. 108. (l) Hardr. 408.

A

nm

ims

ads

ma

cer fo

just

ted

W

tried

peci:

o af

ugh

oper ethe

0) 2

marefchal of the king's hoft in writing under his feal, whi shall be sent to the justices. 2. If, in order to avoid an or lawry, or the like, it was alleged that the defendant was prison, ultra mare, at Bourdeaux, or in the service of mayor of Bourdeaux, this should have been tried by the co tificate of the mayor; and the like of the captain of Cal (o). But, when this was law (p), those towns were under dominion of the crown of England. And therefore, by an rity of reason, it should now hold that in similar cases, a fing at Jamaica or Minorca, the trial should be by certific from the governor of those islands. We also find (q) the the certificate of the queen's messenger, sent to summ home a peerefs of the realm, was formerly held a suffici trial of the contempt in refusing to obey such summons. For matters within the realm: the customs of the city London shall be tried by the certificate of the mayor a aldermen, certified by the mouth of their recorder (r); u on a furmise from the party alleging it, that the cult ought to be thus tried: else it must be tried by the coun (s). As, the custom of distributing the effects of freemend ceased; of enrolling apprentices; or that he who is free one trade may use another; if any of these, or other simil points come in iffue. But this rule admits of an exception where the corporation of London is party, or interested, the fuit; as in an action brought for a penalty inflicted the custom: for there the reason of the law will not end fo partial a trial; but this custom shall be determined by jury, and not by the mayor and aldermen, certifying by mouth of their recorder (t). 4. In some cases, the sheriff London's certificate shall be the final trial: as if the iffue whether the defendant be a citizen of London or a foreign (v), in case of privilege pleaded to be sued only in the courts. Of a nature somewhat similar to which is the tr of the privilege of the university, when the chancellor clair cognizance of the cause, because one of the parties is a p vileg

⁽o) 9 Rep. 31. (p) 2 Roll. Abr. 583. (q) Dyer. 17
177. (r) Co. Litt. 74. 4 Burr. 248. (s) Bro. Abr. 5. 171
pl. 96. (t) Hob. 85. (v) Co. Litt. 74.

al

r

ap

fic tl

ım

ici

.

ty

a

; u

ufte

un

nd

ree

mil

ptic

ed,

ed

ndi

by

y

riff

ue l

eigr

e c

e tr

a p

r. 1

tri

ged person. In this case, the charters, confirmed by act parliament, direct the trial of the question, whether a leged person or no, to be determined by the certificate notification of the chancellor under feal; to which it halfo been usual to add an affidavit of the fact: but if parties be at iffue between themselves, whether A is a aber of the university or no, on a plea of privilege, the hall be then by jury, and not by the chancellor's certith(u); because the charters direct only that the privilege allowed on the chancellor's certificate, when the claim of mizance is made by him, and not where the defendant Alf pleads his privilege, fo that this must be left to the mary course of determination. 5. In matters of ecclesial jurisdiction, as marriage, and of course general bah, and also excommunication, and orders, these, and g like matters, shall be tried by the bishop's certificate. As if he pleaded in abatement, that the plaintiff is exmunicated, and iffue is joined thereon; or if a man ins an estate by descent, and the tenant alleges the dedant to be a bastard; or if on a writ of dower the heir ads no marriage; or if the issue in a quare impedit be, ther or no the church be full by institution; all these bematters of mere ecclesiastical cognizance, shall be tried ertificate from the ordinary. But in an action on the for calling a man baftard, the defendant having pleaded phiscation that the plaintiff was really so, this was ditd to be tried by a jury (x): because, whether the plainbe found either a general or special bastard, the justificawill be good: and no question of special bastardy shall ned by the bishop's certificate, but by a jury (y). For bastard is one born, before marriage, of parents afterwards intermarry: which is baftardy by our law, wh not by the ecclefiaftical. It would therefore be imper to refer the trial of that question to the bishop; who, ther the child be born before or after marriage, will be fure

1) 2 Roll. Abr. 583. (w) Co. Litt. 74. (x) Hob. 179. Dyer. 79.

Ger

whe

the .

the "ar

Got

Wife

oni.

T

man

three

The

(k):

beak

Vo

(h)

to return or certify him legitimate (z). Ability of a clerk p fented (a), admission, institution, and deprivation of a cle shall also be tried by certificate from the ordinary or met politan, because of these he is the most competent judge (h but industion shall be tried by a jury, because it is a may of public notoriety (c), and is likewise the corporal inveture of the temporal profits. Resignation of a benefice n be tried in either way (d); but it seems most properly to within the bishop's cognizance. 6. The trial of all custo and practice of the courts shall be by certificate from proper officers of those courts respectively; and, what turn was made on a writ by the sheriff or under-she shall be only tried by his own certificate (e). And thus me for those several issues, or matters of fact, which are proto be tried by certificate.

IV. A FOURTH species of trial is that by witnesses, teffes, without the intervention of a jury. This is the o method of trial known to the civil law; in which the ju is left to form in his own breast his sentence upon the cr of the witnesses examined: but it is very rarely used in law, which prefers the trial by jury before it in almost ev instance. Save only, that when a widow brings a wri dower, and the tenant pleads that the husband is not de this, being looked upon as a dilatory plea, is, in favou the widow and for greater expedition, allowed to be tried witnesses examined before the judges: and so, faith Finch shall no other case in our law. But sir Edward Coke mentions some others: as, to try whether the tenant in a action was duly fummoned, or the validity of a challeng a juror: fo that Finch's observation must be confined to trial of direct and not collateral issues. And in every fir Edward Coke lays it down, that the affirmative must proved by two witnesses at the least. v. 1

⁽²⁾ See introd. to the great charter, edit. Oxon. fub. anno 12 (2) See book I. ch. 11. (b) 2 Inft. 632. Show. Parl. c.

⁽c) Dyer. 229. (d) '2 Roll. Abr. 583. (e) 9 Rep.

⁽f) L. 423. (g) 1 lnft. 6.

et

(4

a

ve

n

0

fto

n

at

her

m

ord

25,

e o

ju

cr

in

ev

vri

de

vou

ried

ch

ke 1 a

eng

to

ry

nul

. 1

10 I

l. c. Rep V. THE next species of trial is of great antiquity, but meh difused; though still in force if the parties chuse to hide by it; I mean the trial by wager of battet. This feems have owed its original to the military spirit of our ancestors. med to a superstitious frame of mind: it being in the nature an appeal to Providence, under an apprehension and hope however prefumptuous and unwarrantable,) that heaven would the victory to him who had the right. The decision of its, by this appeal to the God of battels, is by some faid have been invented by the Burgundi, one of the northern German clans that planted themselves in Gaul. And it true, that the first written injunction of judiciary combats at we meet with, is in the laws of Gundebald, A. D. 501. thich are preserved in the Burgundian code. Yet it does ot seem to have been merely a local custom of this or that uticular tribe, but to have been the common usage of all hole warlike people from the earliest times (h). And it may to feem from a passage in Velleius Paterculus (i), that the Germans, when first they became known to the Romans, were want to decide all contests of right by the sword : for then Quintilius Varus endeavoured to introduce among them he Roman law and method of trial, it was looked upon (fays he historian) as a " novitas incognitae disciplinae, ut solita "armis decerni jure terminarentur." And among the antient Boths in Sweden we find the practice of judiciary duels eftalifted upon much the fame footing as they formerly were in our own country (i).

This trial was introduced into England, among other Norman customs, by William the Conqueror; but was only used in three cases, one military, one criminal, and the third civil. The first in the court-martial, or court of chivalry and honour (k): the second in appeals of felony (1), of which we shall speak in the next book: and the third upon issue joined in a Vol. III.

⁽h) Seld. of duels. c. 5. (j) l. 2. c. 118. (i) Sternh. de we Sucon l.. 1 c. 7. (k) Co. Litt. 261. (l) 2 Hawk. P. C. 45.

kir

nd :

fan

end given

hin

when

feet

there

lear to be

their

are d

fron

to th

or ft

6 t

cou

cord

only

arm the

only gin:

nes

18.

writ of right, the last and most solemn decision of real pr perty. For in writs of right the jus proprietatis, which frequently a matter of difficulty, is in question; but oth real actions being merely questions of the jus possessions which are usually more plain and obvious, our ancestors of not in them appeal to the decision of providence. Anoth pretext for allowing it, upon these final writs of right, w also for the sake of such claimants as might have the tre right, but yet by the death of witnesses or other defect of ev dence be unable to prove it to a jury. But the most curio reason of all is given in the mirror (m), that it is allowab upon warrant of the combat between David for the people Ifrael of the one party, and Goliah of the Philistines of the other party: a reason, which pope Nicholas I. very serious decides to be inconclusive (n). Of battle therefore on a wr of right (o) we are now to speak; and although the write right itself, and of course this trial thereof, be at present di used; yet, as it is law at this day, it may be matter of cur ofity, at least, to enquire into the forms of this proceeding as we may gather them from antient authors (p).

THE last trial by battel that was joined in a civil sur (though there was afterwards one in the court of chivalry is the reign of Charles the first (q); and another tendered, but not joined, in a writ of right upon the northern circuit is 1638) was in the thirteenth year of queen Elizabeth, as reported by fir James Dyer (r), and was held in Tothill field Westminster, "non fine magna juris consultorum perturbations, saith fir Henry Spelmam (s), who was himself a witness of the ceremony. The form, as appears from the authors before cited, is as follows.

WHEN the tenant in a writ of right pleads the general iffue viz. that he hath more right to hold, than the demandant hat

⁽m) c. 3. §. 23. (n) Decret. part. 2. cauf. 2. qu. 5. c. 22 (o) Append. No. 1. §. 5. (p) Glanvil. I. 2. c. 3 Vet. nat. brev. fol. 2. Now. Narr. tit. Droit patent. fol. 231. (edit. 1534.) Year book 29 Edw. III. 12. Finch. L. 421. Dyer. 301. 2 Inft. 247 (q) Rushw. coll. vol. 2. part. 2. fol. 112. (r) 301. (8) Gloss. 103.

出地

on

d

th

W

tr

ev

io

ab

e d

th

uf

wr it c

di

uri

ing

-

fui

y ii

bu

t ii

re

eld

ie,

s o

or

ue

atl

t

22

ev ar

47

precover; and offers to prove it by the body of his chamnon, which tender is accepted by the demandant; the tenant
the first place must produce his champion, who, by throwng down his glove as a gage or pledge, thus wages or stiputhe battel with the champion of the demandant; who, by
king up the gage or glove, stipulates on his part to accept
the challenge. The reason why it is waged by champions,
and not by the parties themselves, in civil actions, is because,
sany party to the suit dies, the suit must abate and be at an
and for the present; and therefore no judgment could be
given for the lands in question, if either of the parties were
sin in battel (t): and also that no person might claim an
accomption from this trial, as was allowed in criminal cases,
where the battel was waged in person.

A PIECE of ground is then in due time fet out, of fixty tet square, enclosed with lists, and on one side a court erected or the judges of the court of common pleas, who attend here in their scarlet robes; and also a bar is prepared for the lamed serjeants at law. When the court sits, which ought bbe by funrifing, proclamation is made for the parties, and beir champions; who are introduced by two knights, and medreffed in a coat of armour, with red fandals, barelegged from the knee downwards, bareheaded, and with bare arms the elbows. The weapons allowed them are only batons, wflaves, of an ell long, and a four-cornered leather target: 6 that death very feldom enfued this civil combat. In the ourt military indeed they fought with fword and lance, acording to Spelman and Rushworth; as likewise in France my villeins fought with the buckler and baton, gentlemen amed at all points. And upon this, and other circumstances the president Montesquieu (u) hath with great ingenuity not only deduced the impious custom of private duels upon imagnary points of honour, but hath also traced the heroic madness of knight errantry, from the same original of judicial combats. But to proceed.

P 2

WHEN

⁽t) Co. Litt. 294. Dywersite des courts. 304. (u) Sp. L. h. 48.c. 20. 22.

ect ivi

V

ere e w

ere

it,

he d

lf n

(W)

dis, brit

WHEN the champions, thus armed with batons, arriwithin the lists or place of combat, the champion of the tenathen takes his adversary by the hand, and makes oath the the tenements in dispute are not the right of the demandant and the champion of the demandant, then taking the oth by the hand, swears in the same manner that they are; that each champion is, or ought to be, thoroughly persuade of the truth of the cause he sights for. Next an oath again sorcery and enchantment is to be taken by both the champion in this or a similar form; "Hear this, ye justices, that have this day neither eat, drank, nor have upon m neither bone, stone, ne grass; nor any inchantment, so erry, or witchcraft, whereby the law of God may be abased of the law of the devil exalted. So help me God as his saints."

THE battel is thus begun, and the combatants are bound fight till the stars appear in the evening: and, if the cham pion of the tenant can defend himself till the stars appea the tenant shall prevail in his cause; for it is sufficient for his to maintain his ground, and make it a drawn battel, he be ing already in possession; but, if victory declares itself for either party, for him is judgment finally given. This victor may arise, from the death of either of the champions which indeed hath rarely happened; the whole ceremony to fay the truth, bearing a near refemblance to certain rur athletic diversions, which are probably derived from this or ginal. Or victory is obtained, if either champion provi recreant, that is, yields, and pronounces the horrible word craven; a word of difgrace and obloquy, rather than of an determinate meaning. But a horrible word it indeed is the vanquished champion: fince, as a punishment to him for forfeiting the land of his principal by pronouncing that shame ful word, he is condemned, as a recreant, amittere liberal legem, that is, to become infamous and not be accounted libe et legalis homo; being supposed by the event to be prove forfwort n

th

de

iii

on

nat

m

fo

ba

an

id am

ea

hi

be

fo

tor

ins

on

ur

or

OV

rd (

an

S

n fo

me

ra

libe

ove

OLI

infworn, and therefore never to be put upon a jury or ad-

This is the form of a trial by battel; a trial which the mant, or defendant in a writ of right, has it in his election this day to demand; and which was the only decision of the writ of right after the conquest, till Henry the second consent of Parliament introduced the grand assign (w), a muliar species of trial by jury, in concurrence therewith; fring the tenant his choice of either the one or the other. Which example, if discountenancing these judicial combats, as imitated about a century afterwards in France, by an edict should be should be sufficient to Henry the second, and soon after by the rest sufficient to Henry the second, and probably his adviser mein, considers as a most noble improvement, as in fact it as, of the law (x).

VI. A SIXTH species of trial is by wager of law, vadiation, as the foregoing is called wager of battel, vadiation, as the foregoing is called wager of battel, vadiation, believed by beautiful the because, as in the former case, the defendant gave a bege, gage, or vadium, to try the cause by battel; so we have to put in sureties or vadios, that at such a day will make his law, that is, take the benefit which the we have allowed him (y). For our ancestors considered, that we were many cases where an innocent man, of good cret, might be overborne by a multitude of false witnesses; the therefore established this species of trial by the oath of the defendant himself: for if he will absolutely swear himself to chargeable, and appears to be a person of reputation,

(w) Append. No. I. §. 6. (x) Est autem magna assista regale addam beneficium, clementia principis, de consilio procerum, poli, indultum; quo vitae bominum, et status integritati tam sainter consulitur, ut, retinendo quod quis possidet in libero seneliosoli, duelli casum declinare possint homines ambiguum. Ac
i hoc contingit, insperatae et praematurae mortis ultimum evais supplicium, vel saltem perennis infamiae opprobrium illius inliet inverecundi verbi, quod in ore victi turpiter sonat, conselioum. Ex aequitate item maxima prodita est legalis ista institutio.

utnim, quod post multas et longas dilationes vix evincitur per
ullum, per beneficium istius censtitutionis commodius et acceleratius
inditur. (l. 2. 6. 7.) (y) Co. Litt. 295.

P 3

by An

« I

u th

1 2 « h

lesi

held

her leem

defer

qua

indee

and i

nge

" fe

E

leg

tied

(d)

lour

he shall go free and for ever acquitted of the debt, or oth cause of action.

THIS method of trial is not only to be found in the code of almost all the northern nations that broke in upon the Re man empire and established petty kingdoms upon its ruins (z but its original may also be traced as far back as the Mosaic law. "If a man deliver unto his neighbour an afs, or "ox, or a fheep, or any beaft, to keep; and it die, or ! " hurt, or driven away, no man feeing it; then shall an oat " of the Lord be between them both, that he hath not puth " hand unto his neighbour's goods; and the owner of it shall "accept thereof, and he shall not make it good (a)." W shall likewise be able to discern a manifest resemblance, be tween this species of trial, and the canonical purgation the popish clergy, when accused of any capital crime. The defendant or person accused was in both cases to make oath his own innocence, and to produce a certain number of com purgators, who sworethey believed his oath. Somewhat sime lar also to this is the facramentum decisionis, or the volunta and decifive oath of the civil law (b); where one of the parties to the fuit, not being able to prove his charge, offer to refer the decision of the cause to the oath of his adversary which the adversary was bound to accept, or tender the san proposal back again; otherwise the whole was taken as con feffed by him. But, though a custom somewhat similar this prevailed formerly in the city of London (c), yet in gen ral the English law does not thus, like the civil, reduc the defendant, in case he is in the wrong, to the dilemm of either confession or perjury: but is indeed so tender -permitting the oath to be taken, even upon the defendant own request, that it allows it only in a very few cases; an in those it has also devised other collateral remedies for the like parties injured, in which the defendant is excluded from h wager of law. THE

⁽²⁾ Sp. L. b. 28. c. 13. Stiernhook de jure Suconum. l. 1. c. Feud. l. 1. c. 4. 10. 28. (a) Exod, xxii. 10. (b) Ced. 4. 1. 1 (c) Bro. Abr. t. ley. gager. 77.

П

th

od

R

2

iic

r a

r

oat

th

ha

W

b

n

T

th

on

im

ita

th

ffe

ary

fan

con

ır

en

du

nm

r

ant

an

r the

Гн

c.

THE manner of waging and making law is this. He that swaged, or given fecurity, to make his law, brings with iminto court eleven of his neighbours: a custom, which mend particularly described so early as in the league between Affred and Gutrum the Dane (d); for by the old Saxon confintion every man's credit in courts of law depended upon propinion which his neighbour had of his veracity. The thendant then, standing at the end of the bar, is admonished with judges of the nature and danger of a false oath (e). and if he still perfists, he is to repeat this or the like oath : "Hear this, ye justices, that I do not owe unto Richard Jones" the fum of ten pounds, nor any penny thereof, in manner and form as the faid Richard hath declared against me. So help me God." And thereupon his eleven neighbours or impurgators shall avow upon their oaths, that they believe in heir consciences that he saith the truth; so that himself must ssworn de fidelitate and the eleven de credulitate (f). It is add indeed by later authorities (g) that fewer than eleven ompurgators will do: but fir Edward Coke is positive that here must be this number; and his opinion not only ems founded upon better authority, but also upon better reain: for, as wager of law is equivalent to a verdict in the efendant's favour, it ought to be established by the same or qual testimony, namely, by the oath of twelve men. And so ideed Glanvil expresses it (h), "jurabit duodecima manu:" nd in 9 Hen. III. (i) when a defendant in an action of debt nged his law, it was adjudged by the court " quod defendat fe duodecima manu." Thus too, in an author of the age Edward the first (k), we read, adjudicabitur reus ad legem suam duodecima manu." And the antient treatise, endel, dyversite des courts, expressly confirms sir Edward loke's opinion (1).

P 4

(d) cap. 3. Wilk. LL. Angl. Sax. (e) Salk. 682. (f)

h Litt. 295. (g) 2 Ventr. 171. (h) l. 1. c. 9. (i)

hich. Abr. t. ley. 78. (k) Hengham. magna. c. 5. (l) Il.

mient aver oue luy xi. maynz de jurer oue luy, se que ilz entende

lur consciens que il discyt voier. (fol. 300. edit. 1534.)

(in) l. b. c. 63. (a) Bro. Abr. t. top gager. 9.
Hill, xxxiii. 22. (p) Stirrahook de jare da jare

fi

ti

th

de

if

do

de

of

fo

ed

(5

WE

pro

tice

wh

lav

It must be however observed, that so long as the custon continued of producing the festa, the fuit, or witnesses give probability to the plaintiff's demand, (of which we spok in a former chapter) the defendant was not put to wage h law, unless the setta was first produced, and their testimon was found confistent. To this purpose speaks magna carte " Nullus ballivus de caetero ponat aliquem ad leger " manifestam," (that is, wager of battel) " nec ad juramen ' tum," (that is wager of law) simplici loquela sua, (that is, merely by his count or declaration) " fine teffib " fidelibus ad boc inductus." Which Fleta thus explains (m) " Si petens sectam produxerit, et concordes invenianter, tun " reus poterit vadiare legem suam contra petentem et contra se " tam suam prolatam; sed si secta variabilis inveniatur, extun " non tenibitur legem vadiare contra sectam illam." It is tru indeed, that Fleta expressly limits the number of compurga tors to be only double to that of the fecta produced; "ut "duos vel tres testes produxerit ad probandum, oportet que " defensio fiat per quatuor vel per sex; ita quod pro quolibet tel " duos producat juratores, usque ad duodecem:" so that ad cording to this doctrine the eleven compurgators were on to be produced, but not all of them fworn, unless the fee confifted of fix. But, though this might possibly be the ru till the production of the fecta was generally difused, fin that time the duodecima manus feems to have been generally required (n).

In the old Swedish or Gothic constitution, wager of la was not only permitted, as it still is in criminal cases, us less the fact be extremely clear against the prisoner (o) but was also absolutely required in many civil cases: which an author of their own (p) very justly charges as being to source of frequent perjury. This, he tells us, was own to the popish ecclesiastics, who introduced this method purgation from their canon law; and, having sown a plet tiful crop of oaths in all judicial proceedings, reaperated.

⁽m) l. 2. c. 63. (n) Bro. Abr. t. ley gager. 9. (o) Mod. U Hist. xxxiii. 22. (p) Stiernhook de jure Su, conum l. 1. c. 9.

Ш

tor

8 1

ok

h

ion

rte

ge

nen

ua,

tib

m)

tur

s fee

ctun

tru

rga

ut

que

tel

t ac

onl

Sec.

ru

fine rall

la

u

(0)

vhid

g t

WII

od

ple

eap

), U 9.

afterwards an ample harvest of perjuries: for perjuries were punished in part by pecuniary fines, payable to the coffers of the church. But with us in England wager of law is never muired; and is then only admitted, where an action is brought upon fuch matters as may be supposed to be privately transacted between the parties, and wherein the defendant may be presumed to have made satisfaction without being able to prove it. Therefore it is only in action of debt upon imple contract, or for an amercement, in actions of deinue, and of account, where the debt may have been paid, the goods reftored, or the account ballanced, without any midence of either; it is only in these actions, I say, that the defendant is admitted to wage his law (q): fo that wager of law lieth not, when there is any specialty, as a bond or deed, to charge the defendant (for that would be cancelled if fatisfied) but when the death groweth by word only. Nor doth it lie in an action of debt, for arrears of an account, fetfled by auditors in a former action (r). And by fuch wager of law (when admitted) the plaintiff is perpetually barred; for the law, in the simplicity of the antient times, presumthat no one would forswear himself, for any worldly thing (s). Wager of law however lieth in a real action, where the tmant alleges he was not legally fummoned to appear, as well as in mere personal contracts (t).

A MAN outlawed, attainted for false verdict, or for conpiracy or perjury, or otherwise become infamous, as by pronouncing the horrible word in a trial by battel, shall not be permitted to wage his law. Neither shall an infant under the age of twenty-one, for he cannot be admitted to his sath; and therefore, on the other hand, the course of justice shall show equally, and the defendant, where an infant is plaintiss, shall not wage his law. But a feme-covert, when joined with her husband, may be admitted to wage her law: and an alien shall do it in his own language (u).

PS

⁽q) Co. Litt. 295. (r) 10 Rep. 103. (s) Co. Litt. 295. (l) Finch. L. 423. (u) Co. Litt. 295.

la

ar

ki

Pot

A

de

ex

100

th

it

po

re

W

to

m

W

no

ha

ob

fir

th

m

aE

At

ta

IT is moreover a rule, that where a man is compellable b law to do any thing, whereby he becomes creditor to another the defendant in that case shall not be admitted to wage hi law : for then it would be in the power of any bad man toru in debt first, against the inclinations of his creditors, and af terwards to swear it away. But where the plaintiff hath gi ven voluntary credit to the defendant, there he may wag his law; for, by giving him! fuch credit, the plaintiff ha himself borne testimony that he is one whose character ma be trusted. Upon this principle it is, that in an action of debt against a prisoner by a gaoler for his victuals, the de fendant shall not wage his law: for the gaoler cannot refule the prisoner, and ought not to fuffer him to perish for want of sustenance. But otherwise it is for the board or diet of man at liberty. In an action of debt brought by an attorne for his fees, the defendant cannot wage his law, because the plaintiff is compellable to be his attorney. And so, if a fer vant be retained according to the statute of labourers, 5 Eliz c. 4, which obliges all fingle persons of a certain age, and not having other visible means of livelyhood, to go out to fervice; in an action of debt for the wages of fuch a fervant the master shall not wage his law, because the plaintiff was compellable to ferve. But it had been otherwise, had the hiring been by special contract, and not according to the sta tute (w).

In no case where a contempt, trespass, deceit, or any injury with force is alleged against the defendant, is he permitted to wage his law (x): for it is impossible to presume he has satisfied the plaintist his demand in such cases, where damages are uncertain and left to be affessed by a jury. No will the law trust the defendant with an oath to discharge himself, where the private injury is coupled as it were with a public crime, that of force and violence; which would be equivalent to the purgation oath of the civil law, which our has so justly rejected.

EXECUTOR

П

e b

he

h

ru

laf

g

rag

ha

ma

n of

de

ful

van

of l

ne

the

fer

Oliz

and

it to

ant, was

the

fta.

in.

per

e he

da

No

rg

vit

l b

ur

R

EXECUTORS and administrators, when charged for the debt of the deceased, shall not be admitted to wage their law (y): for no man can with a safe conscience wage law of another man's contract; that is, swear that he never entered into it, or at least that he privately discharged it. The king also has his prerogative; for, as all wager of law imports a reslection on the plaintist for dishonesty, therefore there shall be no such wager on actions brought by him (z). And this prerogative extends and is communicated to his debtor and accomptant; for, on a writ of quo minus in the exchequer for a debt in a simple contract, the defendant is not allowed to wage his law (a).

Acil be allowed a chewife as bardy delinages Thus the wager of law was never permitted, but where the defendant bore a fair and unreproachable character; and italfo was confined to fuch cases where a debt might be supposed to be discharged, or satisfaction made in private, without any witnesses to attest it: and many other prudential restrictions accompanied this indulgence. But at length it was confidered, that (even under all its restrictions) it threw to great a temptation in the way of indigent or profligate men: and therefore by degrees new remedies were introduced, wherein no defendant is at liberty to wage his law. So that now no plaintiff need at all apprehend any danger from the hardiness of his debtor's conscience, unless he voluntarily chooses to rely on his adversary's veracity, by bringing an obsolete, instead of a modern, action. Therefore one shall hardly hear at present of an action of debt brought upon a imple contract; that being supplied by an action of trespass on the case for the breach of a promise or assumpsit; wherein, though the specific debt cannot be recovered, yet damages, may, equivalent to the specific debt. And, this being an action of trespass, no law can be waged therein. So, inhead of an action of detinue to recover the very thing detained, an action of trespass on the case in trover and conversion

⁽y) Finch. L 424. (z) Ibid. 425. (a) Co. Litt. 295.

ver fion is usually brought; wherein, though the horse or other fpecific chattel cannot be had, yet the defendant shall pa damages for the conversion, equal to the value of the chat tel; and for this trespass also no wager of law is allowed. I the room of action of account a bill of equity is usually filed wherein, though the defendant answers upon his oath, ye fuch oath is not conclusive to the plaintiff; but he ma prove every article by other evidence, in contradiction t what the defendant has fworn. So that wager of law is quite out of use, being avoided by the mode of bringing the action but still it is not out of force. And therefore, when a new flatute inflicts a penalty, and gives an action of debt for re covering it, it is usual to add, In which no wager of law shall be allowed: otherwife an hardy delinquent might escape any penalty of the law, by fwearing he had never incurred or elfe had discharged it.

THESE fix species of trials, that we have considered in the present chapter, are only had in certain special and eccentrical cases; where the trial by the country, per pais, or be jury, would not be so proper or effectual. In the next chapter we shall consider at large the nature of that principal criterion of truth in the law of England.

The last to go I'm to have the

admits of his delator's confinence, units as refinenced

noofes to rein on his advertisty's veracity, by bringing ..

biolisty maked of a moderate action. Therefore one mal

rist bear at prefent of an eriote of Ath brought upon a

applied to waith and yet bollygait gried state a literature and

an equivalent to the specime detre. And, this being ag

(s) Min. age. (a) Co. Lillie tor

like at graffic to the med and forward believed the wall

togg the grant of downs came of the good and

thing of profpals, no law can be ongoil throning Soring averaged the very thing drained, an action of things to the cale in the parties and the cale in the parties.

(y) Figely L 424.

jer j

inde

Brito

terta plos

(a)

Hend

all th

many

tomp

fual

ters

ach

ords

h E

ws

(2)

A second contract of the second of the secon To y aragus such step step security, attitude to be the and the state of t

at. Ī

d

na

m

lew

re

law

ape red

th

tri b

nex nci

1

a committee or taring out would have a descriptions CHAPTER THE TWENTY THIRD. there's was go be professed in high Consumer

the consideration and the contract of the cont

limited was a state of the state of the state of the OF THE TRIAL BY JURY.

tout. There are and the proving soo than the ways

destilitation of going and reviewed a seculified of

THE subject of our next enquiries will be the nature I and method of the trial by jury; called also the trial rpais, or by the country. A trial that hath been used time pt of mind in this nation, and feems to have been co-eval ith the first civil government thereof. Some authors have adeavoured to trace the original of juries up as high as the bitons themselves, the first inhabitants of our island; but train it is, that they were in use among the earliest Saxon plonies, their institution being ascribed by bishop Nicholson a) to Woden himself, their great legislator and captain. lence it is, that we may find traces of juries in the laws of those nations which adopted the feodal system, as in Gerrany, France, and Italy; who had all of them a tribunal imposed of twelve good men and true, " boni bomines." hally the vafals or tenants of the lord, being the equals or ers of the parties litigant: and, as the lord's vefals judged th other in the lord's courts, fo the king's vafals, or the was themselves, judged each other in the king's court (b). England we find actual mention of them fo clearly as the ws of king Ethelred, and that not as a new invention (c). ternhook (d) ascribes the invention of the jury, which in

⁽a) De jure Saxonum, p. 12. (b) Sp. L. b. 30. c. 18. spitul. Lud. pii. A. D. 819. c. 2. (c) Wilk. LL. Angl. (d) De jure Suconum. l. 1. c. 4.

mer

of o

his 1

21

T

lina

hint

whic

T

the g

ond

ter,

or de

unch

magn

four

be jo

(g) than

form

ter o

A

an a

ury,

more obser

best

attai

these

(f

the Teutonic language is denominated nembda, to Regner king of Sweden and Denmark, who was contemporary with our king Egbert. Just as we are apt to impute the inven tion of this, and some other pieces of juridical polity, the fuperior genius of Alfred the great; to whom, on ac count of his having done much, it is usual to attribut every thing: and as the tradition of antient Greece placed t the account of their one Hercules whatever atchievement wa performed superior to the ordinary prowess of manking Whereas the truth seems to be, that this tribunal was uni verfally established among all the northern nations, and s interwoven in their very constitution, that the earliest ac counts of the one give us also some traces of the other. I establishment however and use, in this island, of what da foever it be, though for a time greatly impaired and shake by the introduction of the Norman trial by battel, was a ways fo highly esteemed and valued by the people, that n conquest, no change of government, could ever prevail abolish it. In magna carta it is more than once insisted of as the principal bulwark of our liberties; but especially h chap. 29. that no freeman shall be hurt in either his perso or property, " nisi per legale judicium parium suorum vel pe " legem terrae." A privilege which is couched in almo the fame words with that of the emperor Conrad, two hun dred years before (e): nemo beneficium suum perdat, nisi s " cundum consuetudinem antecessorum nostrorum et per judiciu " parium suorum." And it was ever esteemed, in all cour tries, a privilege of the highest and most beneficial nature.

BUT I will not mispend the reader's time in fruitless encomiums on this method of trial: but shall proceed to the dissection and examination of it in all its parts, from whence indee its highest encomium will arise; since, the more it is searche into and understood, the more it is sure to be valued. And this a species of knowlege most absolutely necessary for ever gentleman in the kingdom: as well because he may be from quently

I

iei

rit

en

ad

ute

l t

N a

no ni

ac

dat ke

al

t n

H

do

b

río

pe

mo

iun i se

ciu

oun

e.

ncd

ffed

dee

che thi

ver fre

atl

mently called upon to determine in this capacity the rights of others, his fellow-subjects; as because his own property, is liberty, and his life, depend upon maintaining, in its leaf force, the constitutional trial by jury.

TRIALS by jury in civil causes are of two kinds; extraorbiary, and ordinary. The extraordinary I shall only briefly bint at, and confine the main of my observations to that which is more usual and ordinary.

The first species of extraordinary trial by jury is that of the grand assign, which was instituted by king Henry the second in parliament, as was mentioned in the preceding chapter, by way of alternative offered to the choice of the tenant ordefendant, in a writ of right, instead of the barbarous and unchristian custom of duelling. For this purpose a writ de sugna assista eligenda is directed to the sheriff (f), to return bur knights, who are to elect and choose twelve others to be joined with them, in the manner mentioned by Glanvil; (g) who, having probably advised the measure itself, is more than usually copious in describing it: and these, all together, form the grand assist, or great jury, which is to try the matter of right, and must consist of sixteen jurors (h).

ANOTHER species of extraordinary juries, is the jury to try a attaint; which is a process commenced against a former jury, for bringing in a false verdict; of which we shall speak more largely in a subsequent chapter. At present I shall only observe, that this jury is to consist of twenty four of the less men in the county, who are called the grand jury in the attaint, to distinguish them from the first or petit jury; and these are to hear and try the goodness of the former verdict.

WITH

(f) F. N. B. 4.

(g) 1. 2. c. 11-21.

(h) Finch. L.

HE HE

. NX

at

hot

hat

V

Oi

" U

u fh

her

whi

mic

cauf

at V

they

hei

12]

tere

gao

the

abor

writ

the

25 V

Fo

on t

hila

ther

WITH regard to the ordinary trial by jury in civil cases, shall pursue the same method in considering it, that I set on with in explaining the nature of prosecuting actions in genera viz. by following the order and course of the proceeding themselves, as the most clear and perspicuous way of treating it.

When therefore an issue is joined, by these words. "an "this the said A prays may be enquired of by the country, or, "and of this he puts himself upon the country, and th "said B does the like," the court awards a writ of venire sa cias upon the roll or record, commanding the sheriss "the the cause to come bere on such a day, twelve free and law ful men, siberos et legales bomines, of the body of his county by whom the truth of the matter may be better known and who are neither of kin to the aforesaid A, nor th aforesaid B, to recognize the truth of the issue between the said parties (i)." And such writ is accordingly issue to the sheriss.

THUS the cause stands ready for a trial at the bar of the court itself: for all trials were there antiently had, in action which were there the first commenced; which never happene but in matters of weight and consequence, all trifling suit being ended in the court-baron, hundred, or county courts and all causes of great importance or difficulty are still usual retained upon motion, to be tried at the bar in the fuperio courts. But when the usage began, to bring actions of an trifling value in the courts of Westminster-hall, it was foun to be an intolerable burthen to compel the parties, witnesses and jurors, to come from Westmorland perhaps or Cornwall to try an action of affault at Westminster. Therefore the le gislature took into consideration, that the king's justices cam usually twice in the year into the several counties, ad capi endas affifas, to take or try writs of affife, of mort d'ance tor, novel disseisin, nusance, and the like. The form of which writs we may remember was stated to be, the the

⁽i) Append. No. II. §. 4.

IF

es,

to

era

ing

reat

an

ry,

th

tha

aw

nty

wi

ree

th

on

ne

ui

ts

all

ric

an

m

les

Ш

le

m

e

ommanded the sheriff to summon an affise or jury, algo to view the land in question; and then to have the faid gy ready at the next coming of the justices of affife (togewith the parties) to recognize and determine the diffeifin, rother injury complained of. As therefore these judges ere ready in the country to administer justice in real actions faffie, the legislature thought proper to refer other matters iffue to be also determined before them, whether of a ired or personal kind. And therefore it was enacted by thute Westm . 2. 13 Edw I. c. 30. that a clause of nisi prius hould be inserted in all the aforesaid writs of venire facias; hat is, " that the sheriff should cause the jurors to come to Westminster (or wherever the king's courts should be held) on fuch a day in easter and michaelmas terms; nist prius, unless before that day, the justices affigned to take affises "hall come into his faid county." By virtue of which the beriff returned his jurors to the court of the justices of affise, mich was fure to be held in the vacation before easter and michaelmas terms; and there the trial was had.

An inconvenience attended this remedy: principally beaufe, as the sheriff made no return of the jury to the court
at Westminster, the parties were ignorant who they were till
they came upon the trial, and therefore were not ready with
their challenges or exceptions. For this reason by the statute
at Edw. III. c. 11. the method of trials by nist prius was altered; and it was enacted that no inquests (except of assis and
paol-delivery) should be taken by writ of nist prius, till after
the sheriff had returned the names of the jurors to the court
above. So that now the clause of nist prius is left out of the
wit of venire facias, which is the sheriff's warrant to warn
the jury; and is inserted in another part of the proceedings,
a we shall see presently.

For now the course is, to make the sheriff's venire returnable on the last return of the same term wherein issue is joined, viz. hilary or trinity terms; which, from the making up of the issues therein, are usually called issuable terms. And he returns the names

Ch.

nm

my 6

d to

ame

re c

jury,

L

Hale

dm

vefti

wor'

les de do

are

tot

and

ons

cau

pro

ila con

at an

ex

names of the jurors in a panel (a little pane, or oblong pie of parchment) annexed to the writ. This jury is not fun moned, and therefore not appearing at the day, must uns voidably make default. For which reason a compulsive pro cess is now awarded against the jurors, called in the commo pleas a writ of babeas corpora juratorum, and in the king bench a diffringas, commanding the sheriff to have their be dies, or to distrein them by their lands and goods, that the may appear upon the day appointed. The entry therefore of the roll or record is (k), "that the jury is respited, throug " defect of the jurors, till the first day of the next term " then to appear at Westminster; unless before that time " viz. on Wednesday the fourth of March, the justices of ou " lord the king, appointed to take affifes in that county, shall " have come to Oxford, that is, to the place affigned for " holding the affises. Therefore the sheriff is commanded to " have their bodies at Westminster on the said first day of " next term, or before the faid justices of assife, if before "that time they come to Ox ford; viz. on the fourth of March " aforesaid." And, as the judges are sure to come and open the circuit commissions on the day mentioned in the writ, the sheriff returns and summons this jury to appear at the affises, and there the trial is had before the justices of affife and nife prius: among whom (as hath been faid) (1) are usually two of the judges of the courts at Westminster, the whole kingdom being divided into fix circuits for this purpofe. And thus we may observe that the trial of common issues, at nisi prius, was in its original only a collateral incident to the original bufiness of the justices of affise; though now, by the various revolutions of practice, it is become their principal employment: hardly any thing remaining in use of the real affises, but the name.

IF the sheriff be not an indifferent person; as if he be a party in the suit, or be related by either blood or affinity to either of the parties, he is not then trusted to return the jury; but the venire shall be directed to the coroners who in this, as in

⁽k) Append. No. II. §. 4.

⁽¹⁾ See page 58.

II

pie

fun

una

pro

amo

ing

r bo the

re o

oug

erm

ime

ou

fhal

fo

d to

y o

for

irch

oen

the

les,

nif

of

om

we

ras

efs

ns

lly

e.

a

to

;

IS

n

Ch. 23. many other instances, are the substitutes of the sheriff to acute process when he is deemed an improper person. If my exception lies to the coroners, the venire shall be directto two clerks of the court, or to persons of the county med by the court, and fworn (m). And these two, who re called elifors, or electors, shall indifferently name the my, and their return is final.

LET us now pause a while, and observe (with fir Mathew lale) (n) in these first preparatory stages of the trial, how imirably this constitution is adapted and framed for the inrangation of truth, beyond any other method of trial in the wild. For, first the person returning the jurors is a man of one fortune and consequence; that so he may be not only the stempted to commit wilful errors, but likewise be responsihe for the faults of either himself or his officers: and he is bound by the obligation of an oath faithfully to execute is duty. Next, as to the time of their return: the panel is sturned to the court upon the original venire, and the jurors ne to be fummoned and brought in many weeks afterwards the trial, whereby the parties may have notice of the jurors ad of their fufficiency or infufficiency, characters, connectims, and relations, that so they may be challenged upon just ause; while at the same time, by means of the compulsory process (of distringues or babeas corpora) the cause is not like be retarded through defect of jurors. Thirdly, as to the face of their appearance: which in causes of weight and onsequence is at the bar of the court; but in ordinary cases I the affiles, held in the county where the cause of action tiles, and the witnesses and jurors live: a provision most accellently calculated for the faving of expense to the par-For, though the preparation of the causes in point of pleading is transacted at Westminster, whereby the order and uniformity or proceeding is preserved throughout the lingdom, and multiplicity of forms is prevented; yet this 8 no great charge or trouble, one attorney being able to transact the business of forty clients. But the troubleome and most expensive attendance is that of jurors and wineffes

⁽m) Fortesc. de Laud. LL. c. 25.

⁽n) Hift. C. L. c. 12.

20010

the

ion,

rn

ial I

erif

cor

ano

the

atut

iner

the

eno

in

me

aty

res :

pro ad d

e fh

g t

ant

2 0

ime

mse

Bu

ttle

the

gs, hile erit mpo the

witnesses at the trial; which therefore is brought home to then in the country where most of them inhabit. Fourthly, the perfons before whom they are to appear, and before whom the trial is to be held, are the judges of the superior court, if be a trial at bar; or the judges of affife, delegated from the courts at Westminster by the king, if the trial be held in the country: persons, whose learning and dignity secure the jurisdiction from contempt, and the novelty and very parad of whose appearance have no small influence upon the mult tude. The very point of their being strangers in the count is of infinite service, in preventing those factions and partie which would intrude in every cause of moment, were it trie only before persons resident on the spot, as justices of the peace, and the like. And, the better to remove all suspicio of partiality, it was wifely provided by the statutes 4 Edw III. c. 2. 8 Ric. II. c. 2. and 33 Hen. VIII. c. 24. that n judge of affife should hold pleas in any county wherein h was born or inhabits. And, as this constitution prevents par ty and faction from intermingling in the trial of right, fo keeps both the rule and the administration of the laws uniform These justices, though thus varied and shifted at every affile are all fworn to the fame laws, have had the fame education have purfued the same studies, converse and confult together communicate their decisions and resolutions, and preside i those courts which are mutually connected and their judgment blended together, as they are interchangeably courts of appea or advice to each other. And hence their administration o justice, and conduct of trials, are confonant and uniform whereby that confusion and contrariety are avoided, which would naturally arise from a variety of uncommunicating jud ges, or from any provincial establishment. But let us now return to the affifes.

WHEN the general day of trial is fixed, the plaintiff or his attorney must bring down the record to the affises, and enteri with the proper officer, in order to its being called on in course If it be not so entered, it cannot be tried; therefore it is in the

plaintiff's

H

en

ti

if

th

t

he

rad

ult

int

tie

rie

th

cio

dv

t n

n h

par

fo on

ifes ion

her

e i

ent

pea

n o rm

hic

ud

104

hi

eri

rfe

the

ff's

wintiff's breaft to delay any trial by not earrying down the nord: unless the defendant, being fearful of such neglect the plaintiff, and willing to discharge himself from the acm, will himself undertake to bring on the trial, giving pronotice to the plaintiff. Which proceeding is called the by proviso; by reason of the clause then inserted in the off's venire, viz. " proviso, provided that if two writs come to your hands, (that is one from the plaintiff and mother from the defendant) you shall execute only one of hem." But this practice begins to be difused, fince the tute 14 Geo. II. c. 17. which enacts, that if, after iffue ined, the cause is not carried down to be tried according the course of the court, the plaintiff shall be esteemed to monfuited, and judgment shall be given for the defendant in case of a nonsuit. In case the plaintiff intends to try the me, he is bound to give the defendant (if he lives within tymiles of London) eight days notice of trial; and, if he sat a greater distance, then fourteen days notice, in order prevent furprize: and if the plaintiff then changes his mind does not countermand the notice fix days before the trial, shall be liable to pay costs to the defendant for not proceedto trial, by the same last mentioned statute. The defennt however, or plaintiff, may upon good cause shewn to court above, as upon absence or sickness of a material mess, obtain leave upon motion to defer the trial of the me till the next affifes.

But we will now suppose all previous steps to be regularly thed, and the cause to be called on in court. The record then handed to the judge, to peruse and observe the pleaders, and what issues the parties are to maintain and prove, the jury is called and sworn. To this end the triff returns his compulsive process, the writ of babeas spora, or distringus, with the panel of jurors annexed, the judge's officer in court. The jurors contained in the mel are either special or common jurors. Special juries are originally introduced in trials at bar, when the causes the of too great nicety for the discussion of ordinary

dic

ed,

lou

tion

ch:

co

rito

d ef

. 935]

freeholders; or where the sheriff was suspected of partialist though not upon such apparent cause, as to warrant an exception to him. He is in such cases, upon motion in court as a rule granted thereupon, to attend the prothonotary or other proper officer with his freeholder's book; and the officer to take indifferently forty eight of the principal freeholder in the presence of the attorneys on both sides; who are eas of them to strike off twelve, and the remaining twenty so are returned upon the panel. By the statute 3 Geo. II. c. 2 either party is entitled upon motion to have a special justification should be paying the extraordinary expense, unless the jud will certify (in pursuance of the statute 24 Geo. II. c. 18 that the cause required such special jury.

A COMMON jury is one returned by the sheriff according to the directions of the statute 3 Geo. II. c. 25. which a points, that the sheriff shall not return a separate panel f every separate cause, as formerly; but one and the far panel for every cause to be tried at the same affises, containing not less than forty eight, nor more than seventy two, juror and that their names, being written on tickets, shall be p into a box or glass; and when each cause is called, twelve these persons, whose names shall be first drawn out of t box, shall be fworn upon the jury, unless absent, challenge or excused; and unless a previous view of the lands, tenements, or other matters in question, shall have be thought necessary by the court: in which case six or mo of the jurors returned, to be agreed on by the parties, named by a judge or other proper officer of the court, ha be appointed to take fuch view; and then fuch of the jury have appeared upon the view (if any) (o) shall be sworn the inquest previous to any other jurors. These acts are w calculated to restrain any suspicion of partiality in the sheri or any tampering with the jurors when returned.

to no great vicety for the dicielion of cromary

^{(0) 4} Burr. 252.

T

18

ce

a oth

er

lde

ea

fo . 2

ju

as

ud

18

rdi h a

1 f far

inir

ror

e p

ve

f t

nge s,

be

mo

es,

fha

iry m

e we

heri

As the jurors appear, when called, they shall be sworn, es challenged by either party. Challenges are of two is; challenges to the array, and challenges to the polls.

CHALLENGES to the array are at once an exception to the tole panel, in which the jury are arrayed or fet in order by heriff in his return; and they may be made upon account partiality or some default in the sheriff, or his under-officer warrayed the panel. And, generally speaking, the same sions that before the awarding the venire were sufficient to redirected it to the coroners or elifors, will be also sufficito quash the array, when made by a person or officer of ble partiality there is any tolerable ground of fuspicion. h, though there be no personal objection against the sheriff. tif he arrays the panel at the nomination, or under the dition of either party, this is good cause of challenge to the w. Formerly, if a lord of parliament had a cause to be and no knight was returned upon the jury, it was a hof challenge to the array: but an unexpected use having made of this dormant privilege by a spiritual lord (p), hough his title to fuch privilege was very doubtful) (q) it abolished by statute 24 Geo. II. c. 18. Also, by the by of the antient law, the jury was to come de vicineto, mthe neighbourhood of the vill or place where the cause of ion was laid in the declaration; and therefore some of the were obliged to be returned from the hundred in which will lay; and, if none were returned, the array might, shallenged for defect of hundredors. Thus the Gothic or nembda, was also collected out of every quarter of tountry; "binos, trinos, vel etiam senos, ex singulis ter-thorii quadrantibus (1)." For, living in the neighbourd, they were properly the very country, or pais, to th both parties had appealed; and were supposed to w before-hand the characters of the parties and witnesses, therefore the better knew what credit to give to the facts be denizens. And it may be quedien.

tot , fat : (11)

Mr. An . Sugar Sty (1)

K. v. Bp. of Worcester. M. 23 Geo. II. B. R. (r) Stiernhook de jure Goth. utelocke of parl. 211. (a) Olb. Hill. O. S. c. S.

田の世

pol

ojac

By

nat p

mpai the

Vo

(w)

360 alleged in evidence. But this convenience was overball ced by another very natural and almost unavoidable inco venience; that jurors, coming out of the immediate neigh bourhood, would be apt to intermix their prejudices and p tialities in the trial of right. And this our law was fo fenfi of, that it for a long time has been gradually relinquish this practice; the number of necessary hundredors in whole panel, which in the reign of Edward III. were of fantly fix(s), being in the time of Fortescue(t) reduced to fa Afterwards indeed the statute 35 Hen. VIII. c. 6, resto the antient number of fix, but that clause was soon virtua repealed by statute 27 Eliz. c. 6. which required only to And fir Edward Coke also (u) gives us such a variety of cumstances, whereby the courts permitted this necessary nu ber to be evaded, that it appears they were heartily tired At length, by ftatute 4 & 5 Hen. c. 16. it was entir abolished upon all civil actions, except upon penal statut and upon those also by the 24 Geo. II. c. 18. the jury be now only to come de corpore comitatus, from the body of county at large, and not de vicineto, or from the partici neighbourhood. The array by the antient law may also challenged, if an alien be party to the fuit, and upon a obtained by his motion to the court for a jury de medie linguae, fuch a one be not returned by the sheriff, pursu to the flatute 28 Edw. III. c. 18. which enacts, that w either party is an alien born, the jury shall be one half ali and the other denizens, if required, for the more im tial trial. A privilege indulged to strangers in no of country in the world; but which is as antient with us the time of king Ethelred, in whose statute de monti Walliae (then aliens to the crown of England) cap. is ordained, that " duodeni legales bomines, quorum fex h et et fex Angli erunt, Anglis et Wallis jus dicunto." where both parties are aliens, no partiality is to prefumed to one more than another; and therefore the flatute 21 Hen. VI. c. 4. the whole jury are then rected to be denizens. And it may be questioned, whether

(1) Stigrations de juve G

⁽s) Gilb. Hift. C. P. c. 8. (v) 1 loft, 157.

11

ICC

eis

ıfi

h

n

co

to

tua

to

f

nu

ed

tii

ut

be

f

icu

lfd

a i

lie

rfu

wl ali

m

0

us

ti

14

to

re

er

6

thate 3 Geo. II. c. 25. (before referred to) hath not in civil miles undefignedly abridged this privilege of foreigners, by positive directions therein given concerning the manner impanelling jurors, and the persons to be returned in such miles as that the court might probably helitate, especially white case of special juries, how far it has now a power to see a panel to be returned de medietate linguae, and to alming for common jurymen.

jury of women is to be impanelled to try the quellion, whe CHALLENGES to the polls, in rapita, are exceptions to micular jurors; and form to answer the recusatio judicis in civil and canon laws if by the constitutions of which a age might be refused upon any suspicion of partiality (w). the laws of England also, in the times of Bracton (x) Fleta (y), a judge might be refused for good cause; but ow the law is otherwise; and it is held that judges or justicannot be challenged (2). For the law will not suppose possibility of bias or favour in a judge, who is already sworn administer impartial justice, and whose authority greatly pends upon that prefumption and idea. And should the that any time prove flagrantly such as the delicacy of the wwill not prefume before-hand, there is no doubt but that th milbehaviour would draw down a heavy censure from ofe to whom the judge is accountable for his conduct.

But challenges to the polls of the jury (who are judges of a) are reduced to four heads by his Edward Coke (a): proper honoris respectum; propter affection; defection; defectio

p. Propter bonoris respectum; as if a lord of parliament be manelled on a jury, he may be challenged by either party, the may challenge himself.

alove the rent referved, is qualified to ferve upon ini ... all raily of the moist of first

(w) Cod. 3. 1. 16. Decretal. l. 2. t. 28. c. 36. (x) 7. 5. 1.5. (y) l. 6. c. 37. (z) Co. Litt. 294. (a) 1. 150.

H

II

ju

th

te

tv

ve

th

or

al

ca

101

no

cu

the

tri

VO

cal

the

ren

try

fwe

fw

mif

infa

(

enti

in es

c. 4.

2. Propter defectum; as if a juryman be an alien born, t is defect of birth; if he be a flave or bondman, this is fect of liberty, and he cannot be liber et legalis home. U der the word bomo alfo, though a name common to both fe es, the female is however excluded, proper defectum fix except when a widow feigns herfelf with child, in order exclude the next heir, and a suppositious birth is suspect to be intended; then upon the writ de ventre inspiciendo jury of women is to be impanelled to try the question, w ther with child, or not (b). But the principal deficiency defect of estate, sufficient to qualify him to be a jur This depends upon a variety of statutes. And, first, by flatute Weffmi 2. 13 Edw. I.e. 18 none that pals on jur in affifes within the county, but fuch as may diffend 201. the year at the least; which is encreased to 40s, by the tute 27 Edw. I. ft. r. and 2 Hen. V. ft. 2. c. 3. This v doubled by the statute at Eliz. c. 6. which requires in ev fuch case the invers to have estate of freehold to the year value of 41. at the leaft. But, the value of money at t time decreasing very considerably, this qualification raised by the statute 16 & 17 Car. II. c. 3. to 201. per ann which being only a temporary act, for three years, was f fered to expire without renewal, to the great debasement juries. However by the statute 4 & 5 W. & M. c. 24 was again raised to 101. per annum in England and 61. Wales, of freehold lands or copyhold; which is the time that copyholders (as fuch) were admitted to ferve up juries in any of the king's courts, though they had be been admitted to serve in some of the sheriff's courts, by tutes 1 Ric. III. c. 4. and 9 Hen. VIII. c. 13. And, last by statute 3 Geo. II. c. 25. any lease-holder for the term of hundred years absolute, or for any term determinable upon or lives, of the clear yearly value of 201. per annum over above the rent referved, is qualified to ferve upon juries. W the jury is de medietate linguae, that is, one moiety of the E lish tongue or nation, and the other of any foreign one, now

(z) Co. Litt. 294.

⁽b) Cro. Eliz. 566.

cy

e f

evi

ente s fi

ent

61.

13

u

bef

y l

of

on

er i Wi

E

OW

of lands shall be cause of challenge to the alien; for, as he is incapable to hold any, this would totally defeat the privilege.

- 3. JURORS may be challenged propter affectum, for fuspicion of bias or partiality. This may be either a principal challenge, or to the favour. A principal challenge is fuch, where the cause assigned carries with it prima facie evident marks of fuspicion, either of malice or favour: as, that a juror is kin to either party within the ninth degree '(c); that he has been arbitrator on either fide; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the fame cause; that he is the party's mafter, fervant, counsellor, steward or attorney, or of the fame fociety or corporation with him: all these are principal causes of challenge; which, if true, cannot be overruled, for jurors must be omni exceptione majores. Challenges to the favour, are where the party hath no principal challenge; but objects only fome probable circumstances of suspicion, as acquaintance, and the like (d); the validity of which must be left to the determination of triors, whose office it is to decide whether the juror be favourable or unfavourable. The triors, in case the first man called be challenged, are two indifferent persons named by the court; and, if they try one man and find him indifferent, he shall be fworn; and then he and the two triors shall try the next; and when another is found indifferent and fworn, the two triors shall be superseded, and the two first fworn on the jury shall try the rest. (e).
- 4. CHALLENGES propter delictum are for some crime or missemessnor, that affects the juror's credit and renders him infamous. As for a conviction of treason, felony, perjury,

⁽c) Finch. L. 401. (d) In the nembda, or jury, of the intient Goths, three challenges only were allowed to the favour; but the principal challenges were indefinite. "Licebat palam "excipere, et semper ex probabili causa tres repudiare; etiam "plures ex causa praegnanti et manifesta." (Stiernhook 1. 1. 6.4) (e) Co. Litt. 158.

palare.

th

VII

fta

to

co

are

jul

be

fir

ter

me

to 1

200

the

V

adm

the

fran

and

1,]

tleE 1.]

the '

to b

if p

(g

deno jary i nbu

le al

utiq

way,

cend 4 bil

me

or conspiracy; or if he hath received judgment of the pillory tumbrel, or the like; or to be branded, whipt, or fligma tized; or if he be outlawed or excommunicated, or hat been attainted of false verdict, premunire, or forgery; o lastly, if he hath proved recreant when champion in the tria by battel, and thereby hath loft his liberam legem. A juro may himself be examined on oath of voir dire, veritatem di cere, with regard to the three former of these causes of challenge, which are not to his dishonour; but not with regard to this head of challenge, propter delictum, which would be to make him either forfwear or accuse himself, if guilty.

secondina and the party that he use taken morey for his BESIDES these challenges, which are exceptions against the fitness of jurors, and whereby they may be excluded from ferving, there are also other causes to be made use of by the iurors themselves, which are matter of exemption; whereby their fervice is excused, and not excluded. As by statute West. 2. 13 Edw. I. c. 38. fick and decrepit persons. not commorant in the county, and men above feventy years old; and by the statute 7 & 8 W. HI. c. 32, infants under twenty one. This exemption is also extended by divers statutes, customs, and charters, to physicians' and other medical persons, counsel, attorneys, officers of the courts, and the like; all of whom, if impanelled, must shew their special exemption. Clergymen are also usually excused, out of fayour and respect to their function; but, if they are seised of lands and tenements, they are in strictness liable to be impanelled in respect of their lay fees, unless they be in the service of the king or of some bishop; " in obsequio domini regis " vel alicujus episcopi (f)."

IF by means of challenges, or other cause, a sufficient number of unexceptionable jurors doth appear at the trial, either party may pray a tales. A tales is a supply of such men as are fummoned upon the first panel, in order to make up the deficiency. For this purpose a writ of decem tales, of tales to be the state of the state of the states of the st П

Fy

na

atl

ro

di

al.

ard

be

mf

om

the

by

ute

ns, ars

der

ers

ne-

nd

ial

fa

of

er-

15

m

ei

en.

up

Eta

es.

minon law, and must be still so done at a trial at bar, if the jurors make default. But at the assisses or nist prins, by situe of the statute 35 Hen. VIII. c. 6. and other subsequent statutes, the judge is impowered at the prayer of either party to award a tales de circumstantibus (g), of persons present in court, to be joined to the other jurors to try the cause; who are liable however to the same challenges as the principal prors. This is usually done, till the legal number of twelve be compleated; in which patriarchal and apostolical number of Edward Coke (h) hath discovered abundance of mystary (i).

WHEN a sufficient number of persons impanelled, or talesmen, appear, they are then separately sworn, well and truly to try the issue between the parties, and a true verdict to give according to the evidence; and hence they are denominated the jury, jurata, and jurors, sc. juratores.

We may here again observe, and observing we cannot but amire, how scrupulously delicate and how impartially just the law of England approves itself, in the constitution and same of a tribunal, thus excellently contrived for the test and investigation of truth; which appears most remarkably, in the avoiding of frauds and secret management, by the twelve jurors out of the whole panel by lot.

In its caution against all partiality and bias, by quashing the whole panel or array, if the officer returning is suspected to be other than indifferent; and repelling particular jurors, if probable cause be shewn of malice or favour to either party.

(g) Append. No. II. §. 4. (h) I Inst. 153. (i) Paumias relates, that at the trial of Mars, for murder, in the court
informinated arcopagus from that incident, he was acquitted by a
my composed of twelve pagan deities. And Dr. Hickes, who atmutes the introduction of this number to the Normans, (though
allows the institution of juries in general to be of much higher
miquity in England) tells us that among the inhabitants of Normy, from whom the Normans as well as the Danes were demended, a great veneration was paid to the number twelve: "nibil sanctius, nihil antiquius fuit; perinde ac si in ipso hoc numers secreta quaedam esset religio." (Dissert. epistolar. 4.)

the

ther exp.

then

the :

part

T

ente

or is

fele&

tive

man

A

mak in iff

denc

upon

by th

the d

bond

there

apon

(m

ed in work

lome

hath

party. The prodigious multitude of exceptions or challenges allowed to jurors, who are the judges of fact, amounts nearly to the same thing as was practised in the Roman republic, before she lost her liberty: that the select judges should be appointed by the praetor with the mutual consent of the parties. Or, as Tully (j) expresses it: "neminem voluerunt majores nostri, non modo de existimatione cujusquam, sed ne pecuniaria quidem de re minima, esse judicem; nisi qui inter adversarios convenisses."

INDEED these selecti judices bore in many respects a remarkable resemblance to our juries: for they were first returned by the praetor; de decuria senatoria conscribunter; then their names were drawn by lot, till a certain number was compleated; in urnam sortito mittunter, ut de pluribus necessarius numerus consici posset: then the parties were allowed their challenges; post urnam permittitur accusatori, ac reo, ut ex illo numero rejiciant quos putaverint sibi aut inimicos aut ex aliqua re incommodos fore: next they struck what we call a tales; rejectione celebrata, in eorum locum qui rejecti surunt subsortiebatur praetor alios, quibus ille judicum legitimus numerus compleretur: lastly, the judges, like our jury, were sworn; bis perfectis, jurabant in leges judices, ut obstricti religione judicarent (k).

THE jury are now ready to hear the merits; and, to fix their attention the closer to the facts which they are impanelled and sworn to try, the pleadings are opened to them by counsel on that side which holds the affirmative of the question in issue. For the issue is said to lie, and proof is always first required, upon that side which affirms the matter in question: in which our law agrees with the civil (1); if incumbit probatio, qui dicit, non qui negat cum per resum naturam factum-negantis probatio nulla st." The opening

⁽i) Pro Cluentio. 43. (k) Ascon. in Cic. Verr. 1. 6. A learned writer of our own, Dr. Pettingal, hath shewn in an elaborate work (published A. D. 1762.) so many resemblances between the diragai of the Greeks, the judices selection of the Romans, and the juries of the English, that he is tempted to conclude that the latter are derived from the former. (l) Ff. 22. 3 2. Cod. 4. 19. 23.

e

ie

r

:

LS

0,

ut 11

us

re

X

1-

ne

t-

2-

19

A a-

mening counsel briefly informs them what has been trans ated in the court above; the parties, the nature of the action, the declaration, the plea, replication, and other proceedings, ad lattly upon what point the iffue is joined, which is there atdown to be determined. Inftead of which formerly (m) he whole record and process of the pleadings was read to hem in English by the court, and the matter in iffue clearly mlained to their capacities. The nature of the cafe, and evidence intended to be produced, are next laid before mem by counfel also on the same side: and, when their eviince is gone through, the advocate on the other fide opens he adverse case, and supports it by evidence; and then the party which began is heard by way of reply.

THE nature of my present defign will not permit me to ater into the numberless niceties and dictinctions of what is. wis not, legal evidence to a jury (n). I shall only therefore flect a few of the general heads and leading maxims, relame to this point, together with some observations on the manner of giving evidence.

AND, first, evidence fignifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point iffue, either on the one fide or on the other; and no evidence ought to be admitted in any other point. Therefore upon an action of debt, when the defendant denies his bond by the plea of non est factum, and the issue is, whether it be the defendant's deed or no; he cannot give a release of this hond in evidence for that does not destroy the bond, and therefore does not prove the iffue which he has chosen to rely upon, viz. that the bond has no existence. but a legan who made the cutty na

AGAIN:

⁽m) Fortefc. c. 26. (n) This is admirably well performtd in lord chief baron Gilbert's excellent treatife of evidence : a work, which it is impossible to abstract or abridge, without losing ome beauty and destroying the chain of the whole; and which hath lately been engralted into that learned and uleful work, the nireduction to the law of nise prius. 4to. 1767.

evi

in

(0)

me

fu

pro

WC

of

fee

evi

fuc

dat

iuf

be

WI

lay

on

fat

agg

wa

ext

are

mo

fan

nef

dif

tion

Arz

gui

AGAIN; evidence in the trial by jury is of two kinds, ci ther that which is given in proof, or that which the jury may receive by their own private knowlege. The former, or proofs, (to which in common speech the name of evidence is usually confined) are either written, or parol, that is, by word of mouth. Written proofs, or evidence, are, 1. Records, and 2. Antient deeds of thirty years flanding, which prove themselves; but 3. Modern deeds, and 4. Other writings, must be attested and verified by parol evidence of witnesses. And the one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but, if not possible, then the best evidence that can he had shall be allowed. For if it be found that there is any better evidence, existing than is produced, the very not producing it is a prefumption that it would have detected forme falsehood that at present is concealed. Thus, in order to prove a leafe for years, nothing elfe shall be admitted but the very deed of lease itself, if in being; but if that be positively proved to be burnt or destroyed (not relying on any loose negative, as that it cannot be found, or the like) then an attested copy may be produced; or parol evidence be given of its contents. So, no evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as in proof of any general customs, or matters of common tradition or repute) the courts admit of bearfay evidence, or an account of what persons deceased have declared in their life-time: but fuch evidence will not be received of any particular facts. So too, books of account, or shop-books, are not allowed of themselves to be given in evidenge, for the owner; but a servant who made the entry may have recourse to them to refresh his memory: and, if such fervant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence (0): for, as tradefmen are often under a necessity of giving credit without any note or writing, this is therefore, when accompa-. toge and any in the real site and nied

⁽o) Law of nisi prius 266.

П

ci

ay

01 415

by

leich

ii.

it-

the

of

to an

my

0-

me

to

the

ely

ne-

at-

of

her

d;

at-

21-

ive

re-

or

vi-

ay

ch

ıd,

):

dit

12-

ed'

se they do not allow

nied with fuch other collateral proofs of fairness and regulaity (p), the best evidence that can then be produced. Hower this dangerous species of evidence is not carried so far in England as abroad (q); where a man's own books of accounts, by a diffortion of the civil law (which feems to have meant the fame thing as is practifed with us) (r) with the appletory oath of the merchant, amount at all times to full proof. But as this kind of evidence, even thus regulated, would be much too hard upon the buyer at any long diftance of time, the statute 7 Jac. I. c. 12. (the penners of which fem to have imagined that the books of themselves were evidence at common law) confines this species of proof to nch transactions as have happened within one year before. the action brought; unless between merchant and merchant, in the usual intercourse of trade. For accounts of so recent a date, if erroneous, may more eafily be unravelled and adiufted. ing on of tribute the former consider activities as and

amined to prove he own indian. And no counted and WITH regard to parol evidence, or witnesse; it must first be remembered, that there is a process to bring them in by writ of subpoena ad testissicandum: which commands them, laying afide all pretences and excuses, to appear at the trial on pain of 100/. to be forfeited to the king; to which the fatute 5 Eliz. c. 9. has added a penalty of 101. to the party: aggrieved, and damages equivalent to the loss sustained by want of his evidence. But no witness, unless his reasonable expenses be tendered him, is bound to appear at all; nor, if he appears, is he bound to give evidence, till fuch charges. are actually paid him: except he resides within the bills of mortality, and is fummoned to give evidence within the ame. This compulfory process, to bring in unwilling witnesses, and the additional terrors of an attachment in case of disobedience, are of excellent use in the thorough investigaton of truth: and, upon the same principle, in the Athe-Sofrong was Help became piane

⁽p) Salk, 285. (q) Gail. observat. 2. 20. 23. (r) Infrumenta domestica, seu adnotatio, si non aliis quoque adminiculis adjuventur, ad probationem sola non sufficient. (Cod. 4. 19. 5.) Nam exemplo perniciosum est, ut ei scripturae credatur, qua unussisque sibi adnotatione propria debitorem constituit. (Ibid. 1.7.)

1

I

i

A

fi

ti

n

f

nian courts, the witnesses who were summoned to attend the trial had their choice of three things; either to swear to the truth of the fact in question, to deny or abjure it, or else to pay a fine of a thousand drachmas (s).

ALL witnesses, that have the use of their reason, are to be received and examined, except fuch as are infamous, or fuch as are interested in the event of the cause. All others are competent witnesses; though the jury from other circumstances will judge of their credibility. Infamous persons are such as may be challenged as jurors, propter delictum; and therefore never shall be admitted to give evidence to inform that jury with whom they were too fcandalous to affociate. witnesses may be examined upon a voir dire, if suspected to be fecretly concerned in the event: or their interest may be proved in court. Which last is the only method of supporting an objection to the former class; for no man is to be examined to prove his own infamy. And no counsel, attorney. or other person, intrusted with the secrets of the cause by the party himself, shall be compelled, or perhaps allowed, to give evidence of fuch conversation or matters of privacy, as came to his knowlege by virtue of fuch trust and confidence (t) but he may be examined as to mere matters of fact, as the execution of a deed or the like, which might have come to his knowlege without being intrufted in the cause.

ONE witness (if credible) is sufficient evidence to a jury of any single fact; though undoubtedly the concurrence of two or more corroborates the proof. Yet our law considers that there are many transactions to which only one person is privy; and therefore does not always demand the testimony of two, as the civil law universally requires. "Unius responsibility testis omnino non audiatur (v)." To extricate itself out of which absurdity, the modern practice of the civil law courts has plunged itself into another. For, as they do not allow a less number than two witnesses to be plena probatio, they

⁽s) Pott. Antiq. b. 1. c. 21.

⁽t) Law of nifi prius, 267

II.

the

the

to

be

ich

m

ces

as

ore

ry

ted

to

be

ît-

ex-

ey

the

to

as

ce

as

me

0

wo

ha

ri

0

2/10

0

rt

ies

al

67

(2) 100

call the testimony of one, though ever so clear and positive, smi-plena probatio only, on which no sentence can be founded. To make up therefore the necessary complement of witnesses, when they have one only to any single fact, they admit the party himself (plaintiff or defendant) to be examined in his own behalf; and administer to him what is called the suppletory oath: and, if his evidence happens to be in his own favour, this immediately converts the half proof into a whole one. By this ingenious device satisfying at once the soma law, and acknowleging the superior reasonableness of the law of England: which permits one witness to be sufficient where no more are to be had; and, to avoid all temptations of perjury, lays it down as an invariable rule, that nemo testis esse debet in propria causa.

autole traffic for both be is not to cordeal agreement of what he

POSITIVE proof is always required, where from the natire of the case it appears it might possibly have been had. But, next to positive proof, circumstantial evidence or the doctrine of presumptions must take places for when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumfiances which either necessarily, or usually, attend such facts: and these are called presumptions, which are only to be relied upon till the contrary be actually proved. Stabitur praesumptioni donec probetur in contrarium (u) ... Violent prefumption in many times equal to full proof (w); for there those circumstances appear, which necessarily attend the fact. As if a landlord fues for rent due at michaelmas 1754, and the tenant cannot prove the payment, but produces an acquittance for rent due at a subsequent time, in full of all demands; this is a violent prefumption of his having paid the former rent, and is equivalent to full proof; for though the actual payment is not proved, yet the acquittance in full of all demands is proved, which could not be without fuch payment; and it therefore induces to forcible a prefumption, that

the superior court upon a writ of error, after judgment of the superior (u) Co. Litt. 373. 73. (w) Ibid. 6.

? offices for the trial at mili brine, but in the next imme-

(4) Gills, evid 1611

(y) Co. Litt. 37.3.

he.

trut

ner

the

niza

But

cept

mol'

cour

had

T

fenc

ing 1

take

eccle

depo

in a less i

by d

but l

if m

the j

heffe

form

the c

ofob

any e

durin

(3)

no proof shall be admitted to the contrary (x). Probable presumption, arising from such circumstances as usually attend the fact, hath also its due weight? as if, in a suit for rent due 1754, the tenant proves the payment of the rent due in 1755; this will prevail to exonerate the tenant (y), unless it be clearly shewn that the rent of 1754 was retained for some special reason, or that there was some fraud or mistake, so otherwise it will be presumed to have been paid before that in 1755, as it is most usual to receive first the rents of longest standing. Light, or rash, presumptions have no weight or validity at all.

THE oath administred to the witness is not only that what he deposes shall be true, but that he shall also depose the whole truth: fo that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all by standers, and before the judge and jury each party having liberty to except to its competency, which exceptli ons are publickly stated, and by the judge are openly and publiekly allowed or difallowed, in the face of the country; which must curb any secret bias or partiality, that might arise in his own breast. And if, either in his directions or decisions, he mis-states the law by ignorance, inadvertence, or defign, the counsel on either fide may require him publickly to feal a bill of exceptions; flating the point wherein he is supposed to err: and this he is obliged to lear by statute Weltm. 2. 12 Edw. T. c. 21. or, if he refules fo to do, the party may have a compullory writ against him (2), commanding him to feal it, if the fact alleged be truly flated: and if he returns, that the fact is untruly flated, when the cafe is otherwife, an action will he against him for making a faife return. This bill of exceptions is in the nature of an appear; examinable, not in the court out of which the record issues for the trial at nifi prius, but in the next immediate superior court, upon a writ of error, after judgment

⁽x) Gilb. evid. 161. Br. 182. 2 Inft. 487

⁽y) Co. Litt. 373.

tt. 373. (z) Reg.

d

r

ıt

2

t

t

e

e

è

1

t

r

9

midence, concerning the legal consequences of which there which adverse party may if he pleases demur to the whole evidence; which admits the ruth of every fact that has been alleged, but denies the sufficiency of them all in point of law to maintain or overthrow the issue of the jury, to be decided (as it ought) by the court. But neither these demurrers to evidence, nor the bills of exemptions, are at present so much in use as formerly; since the murt in granting a new trial, which is now very commonly and for the missuescent of the judge at nish prius.

This open examination of witnesses viva voce, in the prefence of all mankind, is much more conducive to the clearing up of truth (b), than the private and feeret examination aken down in writing before an officer, or his clerk, in the eclefiaftical courts, and all others that have borrowed their matice from the civil law where a witness may frequently spoie that in private, which he will be afhamed to teftife a public and folemn tribunal. There an artful or cares es scribe may make a witness speak what he never meant. wheffing up his depositions in his own forms and language ! buthe is here at liberty to correct and explain his meaning mifunderstood; which he can never do after a written dowhich is once taken Belides, the occasional questions of be judge, the jury, and the counsely propounted to the witwill fit out the truth much better than a formal fet of interrogatories previously penned and fettled : and the confronting of adverse witnesses is another opportunity obtaining a clear discovery, which can never be had upon my other method of trial. Nor is the presence of the judge, wring the examination, a matter of small importance; for, sepped et, gan limbilieter er fi font dicere, uterum unum condet

(f) Vaugh, 148, 149

[.] o co Litt. 72. g. Rep ront, du che ca que esteros contestes de conteste de c

wa!

den

fun

pea

int

upo

the

An

to h

tain

he m

in c

V

nde

othe

fuo

and I

to fi

their

law

T

case

rerd

dela

mle

agre

unki

great

if, a

of a fed c

But

dict.

befides the respect and awe with which his presence will na turally inspite the witness, he is able by use and experience to keep the evidence from wandering from the point in iffue In fhort, by this method of examination, and this only, the persons who are to decide upon the evidence have an oppor tunity of observing the quality, age, education, understand ing, behaviour, and inclinations of the witness; in which points all persons must appear alike, when their deposition are reduced to writing, and read to the judge, in the absence of those who made them: and yet as much may be fre quently collected from the manner in which the evidence delivered, as from the matter of it. These are a few of the advantages attending this, the English, way of giving tell mony, ore tenus. Which was also indeed familiar amon the antient Romans, as may be collected from Quinctilian (c) who lays down very good instructions for examining an crofs-examining witnesses viva voce. And this, or some what like it, was continued as low as the time of Hadrian (d) but the civil law, as it is now modelled, rejects all publ examination of witnesses.

As to such evidence as the jury may have in their ow consciences, by their private knowlege of sasts, it was a antient doctrine, that this had as much right to sway the judgment as the written or parol evidence which is delivered in court. And therefore it hath been often held (e), the though no proofs be produced on either side yet, the jurnight bring in a verdict. For the oath of the jurors, to sait according to the best of their knowlege. Which construction was probably made out of tenderness to juries; the they might escape the heavy penalties, of an attaint, in cathey could show by any additional proof, that their werdings.

defathad courte and the chars that kern borrowed their

(e) Year book, 14 Hen. VII. 29. Hob. 227. 1 Lev.

(f) Vaugh, 148, 149.

⁽c) Instit. erat. l. g. c. 7, (d) See his epistle to Varus, l'egate or judge of Cicilia: "tu magis scire potes, quanta fides babenda testibus; qui, et cujus dignituitis, et cujus aestimulus sinte, et, qui simpliciter wisi sint dicere, utrum unum cundemq meditatum sermonem attulerint, an ad ea quae interrogaver extempora verisimiliares publicint." (Ff. 22.5: 3)

mas agreeable to the truth, though not according to the evidence produced; with which additional proof the law presemed they were privately acquainted, though it did not appear in court. But this doctrine was gradually exploded, when attaints began to be disused, and new trials introduced in their stead. For it is quite incompatible with the grounds, upon which such new trials are every day awarded, viz. that the verdict was given without, or contrary to, evidence. And therefore, together with new trials, the practice seems in have been first introduced (g), which now universally obnins, that if a juror knows any thing of the matter in issue, the may be sworn as a witness, and give his evidence publicly in court.

When the evidence is gone through on both fides, the judge in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence.

The jury, after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider of their redict: and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed. A method of accelerating unanimity not wholly unknown in other constitutions of Europe, and in matters of greater concern. For by the golden bulle of the empire (h), if, after the congress is opened, the electors delay the election of a king of the Romans for thirty days, they shall be sed only with bread and water, till the same is accomplished. But if our juries eat or drink at all, or have any eatables about them, without consent of the court, and before verdict, it is sineable; and if they do so at his charge for whom

Th

fuit

fuit

had

thei

our

from

privi

of

giver vary

ndee

llow

here

egal

Hare

ant a

uftai

which

So

natte:

rill fi Westr

ne na

ne ac

hat i

pinio

nd fo

(o) I

nd the

erdict.

they afterwards find, it will fet afide the verdict. Also if they speak with either of the parties or their agents, after they are gone from the bar; or if they receive any fresh evidence in private; or if to prevent dispute, they cast lots for whom they shall find; any of these circumstances will entirely vitiate the verdict. And it has been held, that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned (i), the judges are not bound to wait for them. but may carry them round the circuit from town to town in a cart (k). This necessity of a total unanimity feems to be peculiar to our own constitution (1); or, at least, in the nembda or jury of the antient Goths, there was required (even in criminal cases) only the consent of the major part; and in case of an equality, the defendant was held to be acquitted (m).

WHEN they are all unanimously agreed, the jury return back to the bar; and, before they deliver their verdict, the plaintiff is bound to appear in court, by himself, attorney or counfel, in order to answer the americement to which by the old law he is liable, as has been formerly mentioned (n). in case he fails in his suit, as a punishment for his false claim To be amerced, or a mercie, is to be at the king's mercy with regard to the fine to be imposed : in misericordia domin regis pro falso clamore suo. The amercement is distused, but the form still continues; and if the plaintiff does not appear no verdict can be given, but the plaintiff is faid to be nonfuit non fequitur clamorem fuum. Therefore it is usual for plaintiff, when he or his counsel perceives that he has not gi ven evidence fufficient to maintain his issue, to be voluntarily nonfuited, or withdraw himfelf: whereupon the crier is ordered to call the plaintiff; and if neither he, nor any body for him, appears, he is nonfuited, the jurors are discharged, the action is at an end, and the defendant shall recover his costs The theme will be tree onlest of the court, and before ver-

⁽i) Mirr. c. 4 §. 24. (k) Lib. Aff. fol. 40. pl. 11. (l) Se Barrington on the statutes. 17, 18, 19. (m) Stiernh. l. 1. 4. (n) Pag. 275.

I.

if

er

i-

or ly

u-

ut

or m,

in be

he ed

rt; ac-

ım

the

ey. by

n), m.

rcy

in but

ear

uit

ra

gi

rik

rec

fo

the

fts

Fh

Se

. 4

The reason of this practice is, that a nonsuit is more eligible for the plaintiff, than a verdict against him : for after a nonwhich is only a default, he may commence the fame hit again for the same cause of action; but after a verdict ad, and judgment consequent thereupon, he is for ever arred from attacking the defendant upon the fame ground of omplaint. But, in case the plaintiff appears, the jury by heir foreman deliver in their verdict.

AVERDICT, vere dictum, is either privy or public. A rivy verdict is, when the judge had left or adjourned the ourt; and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict pivily to the judge out of court (o): which privy verdict of no force, unless afterwards affirmed by a public verdict? iven openly in court; wherein the jury may, if they please, ary from their privy verdict. So that the privy verdict is ndeed a mere nullity; and yet it is a dangerous practice, llowing time for the parties to tamper with the jury, and herefore very feldom indulged. But the only effectual and gal verdict is the public verdict; in which they openly dedare to have found the issue for the plaintiff, or for the defenant; and if for the plaintiff, they affess the damages also Mained by the plaintiff, in confequence of the injury upon which the action is brought. The had your color is being to

plaint or defendant (a). SOMETIMES, if there arises on the case any difficult latter of law, the jury for the fake of better information, nd to avoid the danger of having their verdict attainted, find a special verdict; which is grounded on the statute. Westin. 2. 13 Edw. I. c. 30. S. 2. And herein they state enaked facts, as they find them to be proved, and pray advice of the court thereon, concluding conditionally, at if upon the whole matter the court shall be of, pinion that the plaintiff had cause of action, they then ad for the plaintiff; if otherwise, then for the defendant.

(0) If the judge hath adjourned the court to his own lodgings, if there receives the verdict, it is a public and not a prive erdict. p) L. 14. 6

U

m

nde

lon

rite

Cart

ı ti

Spart loft,

G

dmi

and

that h

nen,

tnjoy

of the

lunta

s not

be al

On th

t ra

would

This is entered at length on the record, and afterwards argued and determined in the court at Westminster, from whence the issue came to be tried.

ANOTHER method of finding a species of special verdict. is when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judge or the court above, on a special case stated by the counsel on both sides with regard to a matter of law: which has the advantage over a special verdict, that it is attended with much less expense, and obtains a much speedier decision; the postea (of which in the next chapter) being stayed in the hands of the officer of nisi prius, till the question is determined, and the verdict is then entered for the plaintiff or defendant as the case may happen. But as nothing appears upon the record but the general verdict, the parties are hereby precluded from the benefit of a writ of error, if dislatisfied with the judge ment of the court or judge upon the point of law, Which makes it a thing to be wished, that a method could be devised of either leffening the expense of special verdicts, or else of entering the case at length upon the postea. But in both these instances the jury may, if they think proper, take upon themfelves to determine, at their own hazard, the complicated question of fact and law; and, without either special verdid or special case, may find a verdict absolutely either for the plaintiff or defendant (p). Someramassial there exilly on the cube on

When the jury have delivered in their verdict, and is recorded in court, they are then discharged. And so ends the trial by jury: a trial, which besides the other valuadvantages which we have occasionally observed in it progress, is also as expeditious and cheap, as it is convenient, equitable, and certain; for a commission out of chancery, or the civil law courts, for examining witnesse in one cause will frequently last as long, and of course by full as expensive, as the trial of a hundred issues at many prints: and yet the fact cannot be determined by such commissioner

D. 23.

t

ut It

es

X-

he he

he

rd

m

ch

ed

0

ef

m-

ie

th

ve

le

b

ni

m

er

moners at all; no, not till the depositions are published alread at the hearing of the cause in court.

UPON these accounts the trial by jury ever has been, and ruftever will be, looked upon as the glory of the English . And, if it has so great an advantage over others in redating civil property, how much must that advantage be ightened, when it is applied to criminal cases! But this we ult refer to the ensuing book of these commentaries: only ferving for the present, that it is the most transcendant prilege which any subject can enjoy, or wish for, that he can-the affected either in his property, his liberty, or his pera, but by the unanimous consent of twelve of his neighbours dequals. A constitution, that I may venture to affirm has, der providence, secured the just liberties of this nation for long fuccession of ages. And therefore a celebrated French inter (q), whe concludes, that because Rome, Sparta, and arthage have lost their liberties, therefore those of England time must perish, should have recollected that Rome, harta, and Carthage, at the time when their liberties were h, were strangers to the trial by jury.

GREAT as this eulogium may seem, it is no more than its admirable constitution, when traced to its principles, will be found in sober reason to deserve. The impartial immissivation of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and these generally selected by the prince or such as moy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary biass towards those of their own rank and dignity: it is not to be expected from human nature, that the few should be always attentive to the interests and good of the many. On the other hand, if the power of judicature were placed it random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action

⁽q) Montesq. Sp. L. xi. 6.

chy of 1

bou

ein i

aire form

and,
again
mal,
ime

YE

fecti

pr:

efect

o thi

tire

iding

nals

uffice

(t) 2

would be every day established in our courts. It is wisely therefore ordered, that the principles and axioms of law which are general propositions, flowing from abstracted reason and not accommodated to times or to men, should be deposite in the breafts of the judges, to be occasionally applied to fuch facts as come properly afcertained before them. Fo here partiality can have little scope: the law is well known and is the same for all ranks and degrees; it follows as a re gular conclusion from the premises of fact pre-established But in fettling and adjusting a question of fact, when intrusted to any fingle magistrate, partiality and injustice have a ample field to range in; either by boldly afferting that to b prove! which is not fo, or more artfully by suppressing some circumstances, stretching and warping others, and distinguish ing away the remainder. Here therefore a competent num ber of fenfible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best in veftigators of truth, and the furest guardians of public justice For the most powerful individual in the state will be cautiou of committing any fragrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till th hour of trial; and that, when once the fact is ascertained the law must of course redress it. This therefore preserves in the hands of the people that share, which they ought to have in the administration of public justice, and prevents the en croachments of the more powerful and wealthy citizens. Ever new tribunal, erected for the decision of facts, without th intervention of a jury, (whether composed of justices of the peace, commissioners of the revenue, judges of a cour of conscience, or any other standing magistrates) is a ste towards establishing aristocracy, the most oppressive of abso lute governments. The feodal fystem, which, for the sak of military fubordination, purfued an aristocratical pla in all its arrangements of property, had been intolerable in times of peace, had it not been wisely counterpoise by that privilege, so universally diffused through ever part of it, the trial by the feodal peers. And in every country

lot Montefa Pro L. v. 6.

Ch. 23.

d

ed

an

b

h

m

011

in.

ce

ou

her

nec

th

ed

s ii

av

en

ver

th

th

our

fte

blo

fak

plan

rabl

oise

very very intry

nuntry on the continent, as the trial by the peers has been gadually difused, so the nobles have increased in power, till the flate has been torn to pieces by rival factions, and oligarby in effect has been established, though under the shadow regal government; unless where the miserable commons are taken shelter under absolute monarchy, as the lighter mil of the two. And, particularly, it is a circumstance well orthy an Englishman's observation, that in Sweden the ial by jury, that bulwark of northern liberty, which contimed in its full vigour so lately as the middle of the last cenmy (r), is now fallen into disuse (s): and that there, hough the regal power is in no country fo closely limited, yet liberties of the commons are extinguished, and the gomment is degenerated into a mere aristocracy (t). It is brefore, upon the whole, a duty which every man owes to scountry, his friends, his posterity, and himself, to mainin to the utmost of his power this valuable constitution in lits rights; to restore it to its antient dignity, if at all imaired by the different value of property, or otherwise deviated om its first institution; to amend it, wherever it is defective; d, above all, to guard with the most jealous circumspection minft the introduction of new and arbitrary methods of ial, which, under a variety of plaufible pretences, may in me imperceptibly undermine this best preservative of Endif liberty. er universally admitte

YET, after all, it must be owned, that the best and most sectual method to preserve and extend the trial by jury practice, would be by endeavouring to remove all the sects, as well as to improve the advantages, incident this mode of enquiry. If justice is not done to the thire satisfaction of the people, in this method of deling facts, in spite of all encomiums and panegyrics on this at the common law, they will resort in search of that thice to another tribunal; though more dilatory, though the expensive, though more arbitrary in its frame and constitution

⁽t) 2 Whitelocke of parl. 427. (s) Mod. Un. Hift, xxxiii, 22.

ab

de

de

are

pai

rec

bu

the

no.

but

con

adv

in fi

fely

whe

mul

pula

if a

trial

but,

occa

the v

reft.

local

thou

tution. If justice is not done to the crown by the verdict a jury, the necessities of the public revenue will call for erections of summary tribunals. The principal defects se to be,

1. THE want of a complete discovery by the oath of This each of them is now entitled to have, by ing through the expence and circuity of a court of equi and therefore it is sometimes had by consent, even in the con of law. How far fuch a mode of compulsive examination agreeable to the rights of mankind, and ought to be introd ced in any country, may be matter of curious discussion. is foreign to our present enquiries. It has long been int duced and established in our courts of equity, not to ment the civil law courts; and it feems the height of judicial furdity, that in the same cause, between the same parties. the examination of the fame facts, a discovery by the o of the parties should be permitted on one side of Westminst hall, and denied on the other: or that the judges of one the fame court should be bound by law to reject such a spec of evidence, if attempted on a trial at bar; but, when ting the next day as a court of equity, should be obliged hear such examination read, and to found their decrees up In short, common reason will tell us, that in the sa country, governed by the same laws, such a mode of enqu should be univerfally admitted, or else univerfally rejected

2. A SECOND defect is of a nature somewhat similar the first: the want of a compulsive power for the product of books and papers belonging to the parties. In the has of third persons they can generally be obtained by no of court, or by adding a clause of requisition to writ of subpoena, which is then called a subpoena duces ten But, in mercantile transactions especially, the sight of party's own books is frequently decisive; such, for instance the daybook of a trader, where the transaction must recently entered, as really understood at the time; thou subsequent events may tempt him to give it a differ colour. And as, this evidence may be finally obtains

tl

e

ui

or

nt

nti

es,

0

nft

e

pe

n

red

u

fa

qu

la

uct

ha

y t

0

teci

of

tar

ult

hou

ffer

ain

and produced on a trial at law, by the circuitous course of sling a bill in equity, the want of an original power for the ame purposes in the courts of law is liable to the same observations as were made on the preceding article.

3. Another want is that of powers to examine witness abroad, and to receive their depositions in writing, where the witnesses relide, and especially when the cause of action arises in a foreign country. To which may be added the power of examining witnesses that are aged, or going abroad, upon interrogatories de bene esse; to be read in evidence if the trial should be deferred till after their death or departure, but otherwise to be totally suppressed. Both these are now very frequently effected by mutual consent, if the parties are open and candid; and they may also be done indirectly at any time, through the channel of a court of equity; but such a practice has never yet been directly adopted (u) as the rule of a court of law.

4. THE administration of justice should not only be chaste, but (like Caefar's wife) should not even be suspected. A jury coming from the neighbourhood is in some respects a great advantage; but is often liable to strong objections: especially insmall jurisdictions, as in cities which are counties of themfelves, and fuch where affifes are but feldom holden; or where the question in dispute has an extensive local tendency; where a cry has been raised and the passions of the multitude been inflamed; or where one of the parties is popular, and the other a stranger or obnoxious. It is true that fa whole county is interested in the question to be tried, the tial by the rule of law (w) must be in some adjoining county: but, as there may be a frict interest so minute as not to occasion any biass, so there may be the strongest biass, where the whole county cannot be faid to have any pecuniary intereft. In all these cases, to summon a jury, labouring under local prejudices, is laying a snare for their consciences: and, though they should have virtue and vigour of mind suffitraining case of the iffice dicated by the bause of lorg

⁽u) See page 75. (w) Stra. 177.

· ju

en

de g

I

yric

be

neju

and t

his r

eftig

ount

Vol

cient to keep them upright, the parties will grow suspicion and resort under various pretences to another mode of trice. The courts of law will therefore in transitory actions very ten change the venue, or country wherein the cause is to tried (x): but in local actions, though they sometimes do indirectly and by mutual consent, yet to effect it direct and absolutely, the parties are driven to the delay and e pense of a court of equity; where, upon making out a preper case, it is done upon the ground of being necessary to fair, impartial, and satisfactory trial (y).

broad, upon interfogatories de levre effe; to be read in era-THE locality of trial required by the common law feems consequence of the antient locality of jurisdiction. All or the world, actions transitory follow the person of the defer dant, territorial fuits must be discussed in the territorial trib nal. I may fue a Frenchman here for a debt contracted abroad; but lands lying in France must be fued for there, an English lands must be fued for in the kingdom of England Formerly they were usually demanded only in the court-bard of the manor, where the fleward could fummon no jurors bu fuch as were the tenants of the lord. When the cause was re moved to the hundred court, (as feem's to have been the court in the Saxon times) (z) the lord of the hundred had a farther power, to convoke the inhabitants of different vills to form jury; observing probably always to intermix among them flated number of tenants of that manor wherein the disput arofe. When afterwards it came to the county court, the great tribunal of Saxon justice, the sheriff had wider authority and could impanel a jury from the men of his county large: but was obliged (as a mark of the original locality the cause) to return a competent number of hundredors; omi ting the inferior diffinction, if indeed it ever existed. An when at length, after the conquest, the king's justiciars dre the cognizance of the cause from the county court, thoug the In all the cares, to human a just, lagueans under

otal projudices, is laving a facte for their confidences; and,

⁽x) See pag. 294. (y) This, among a number of other inflance was the case of the issues directed by the house of lords in the case between the Duke of Devonshire and the minors of the county of Dcrby, A.D. 1762. (z) LL. Edw. Conf. c. 32. Wilk. 203.

could have fummoned a jury from any part of the kingm, yet they chose to take the cause as they found it, with lis local appendages; triable by a stated number of hundors, mixed with other freeholders of the county. The fiction as to hundredor hath gradually worn away, and at 18th entirely vanished (a); that of counties still remains, many beneficial purposes: but, as the king's courts have inidiction co-extensive with the kingdom, there furely can the impropriety in departing from the general rule, when great ends of justice warrant and require an exception.

IHAVE ventured to mark these defects, that the just paneric, which I have given on the trial by jury, might appear be the refult of fober reflection, and not of enthusiasm or rijudice. But should they, after all, continue unremedied ad unsupplied, still (with all its imperfections) I trust that his mode of decision will be found the best criterion, for indigating the truth of facts, that was ever established in any ountry. The state of again should the halbs mini town langes of the

(a) See pag. 360.

VOL. III.

nI

u the

t,

time if was empired ont, is thus consumed be the

server, les seal of provide.

with the control of the control of the control

se atomorais o planto estaminista de la

to be and the early relability to complete and

from is done the leastern to the language of infaction are

As trial, it is entered on second, and as cally a time

and a supplied of bases contact class and in the and the language of the form of the contraction of and the season was gard of the season of the season of

lines out or the first is now returned to the conti of sich is was find a day to be history of the and it

about of his time of our signer and a shirt of stall feet and is been expended to the lay a flow dentition was burneds to misself with prior federac doise of the country of This nisting it to bear edge need from all viscon accept under

211

fe

or

by

eit

cifi

or.

tri

for

tice

vail vero

fely

the

con

with

if th

four

the |

or fe

fmi

law

fequi

T

cour trial,

(b)

with butterly was the capt whit of normies that starting CHAPTER THE TWENTY FOURTH. and the state of t

OF JUDGMENT, AND ITS INCIDENTS compared the control of the control

to mandature in for bus with softer to lot to deliver solds.

to the farming secretarian like the first that the street warry before ribility and in the fact the first first him a

six medical passes side there passed as a transferrances

Carol parts in unique branch trette a the to abie miss

TN the following chapter we are to confider the transactions I in a cause, next immediately subsequent to arguing the demurrer, or trial of the iffue.

IF the iffue be an iffue of fact; and, upon trial by any of the methods mentioned in the two preceding chapters, it be found for either the plaintiff or defendant, or specially; or if the plaintiff makes default, or is nonfuit; or whatever, in fhort, is done subsequent to the joining of iffue and awarding the trial, it is entered on record, and is called a poftea (a) The substance of which is, that postea, afterwards, the said plaintiff and defendant appeared by their attorneys at the place of trial; and a jury, being fworn, found fuch a verdict or, that the plaintiff after the jury fworn made default, and did not profecute his fuit; or, as the case may happen. This is added to the roll, which is now returned to the court from which it was fent: and the history of the cause, from the time it was carried out, is thus continued by the postea.

be

oi in

ng

a)

aid

act

ind

on

X1

NEXT follows, fixthly, the judgment of the court upon what has previously passed; both the matter of law and matter of fact being now fully weighed and adjusted. Judgment may however for certain causes be fuspended, or finally arrested: for it cannot be entered till the next term after trial had, and that upon notice to the other party. So that if any desect of justice happened at the trial, by surprize, inadvertence, or misconduct, the party may have relief in the court above, by obtaining a new trial; or if, notwithstanding the issue of safe be regularly decided, it appears that the complaint was either not actionable in itself, or not made with sufficient presision and accuracy, the party may supercede it, by arresting or staying the judgment.

1. CAUSES of suspending the judgment by granting a new trial, are at present wholly extrinsic, arising from matter foreign to or debors the record. Of this fort are want of noice of trial; or any flagrant misbehaviour of the party prerailing towards the jury, which may have influenced their rerdict; or any gross misbehaviour of the jury among themkives: also if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, fo that he is reasonably distatisfied therewith (b); or if they have given exorbitant damages (c); or ithe judge himself has mis-directed the jury, so that they found an unjustifiable verdict; for these, and other reasons of the like kind, it is the practice of the court to award a new or second trial. But if two juries agree in the same or a finilar verdict, a third trial is feldom awarded (d): for the law will not readily suppose, that the verdict of any one sub-Equent jury can countervail the oaths of two preceding ones.

THE exertion of these superintendent powers of the king's tourts, in setting aside the verdict of a jury and granting a new that, on account of misbehaviour in the jurors, is of a date R 2 extremely

⁽b) Law of nist prins. 303, 4. (c) Comb. 357. (d) 6 Mod. n. Salk. 249.

i

fu

th

21

W

m

m

pe:

to

fue

the

ha

att

tria

fee

An

eaf

extremely antient. There are instances, in the year books of the reigns of Edward III. (e), Henry IV. (f), and Henry VII. (g), of judgments being stayed (even after a trial at bar) and new venire's awarded, because the jury had eat and drank without confent of the judge, and because the plaintiff had privately given a paper to a juryman before he was fworn. And upon these the chief justice, Glyn, in 1655, grounded the first precedent that is reported in our books (h) for granting a new trial upon account of excessive damages given by the jury: apprehending with reason, that notorious partiality in the jurors was a principal species of misbehaviour. A few years before, a practice took rife in the common pleas (i), of granting new trials upon the mere certificate of the judge. (unfortified by any report of the evidence) that the verdice had passed against his opinion: though chief justice Rolle (who allowed of new trials in case of misbehaviour, surprize. or fraud, or if the verdict was notoriously contrary to evidence) (k) refused to adopt that practice in the court of king'sbench. And at that time it was clearly held for law (1), that whatever matter was of force to avoid a verdict, ought to be returned upon the poffea, and not merely furmifed to the court: left posterity should wonder why a new venire was awarded. without any fufficient reason appearing upon the record. But very early in the reign of Charles the fecond new trials were granted upon affidavits (m); and the former strictness of the courts of law, in respect of new trials, having driven many parties into equity to be relieved from oppressive verdicts. they are now more liberal in granting them: the maxim at present adopted being this, that (in all cases of moment) where justice is not done upon one trial, the injured party is entitled to another (n).

FOR-

⁽e) 24 Edw. III. 24. Bro. Abr. t. werdite. 17. (f) 11 Hen. IV. 18. Bro. Abr. t. enquest. 75. (g) 14 Hen. VII. 1. Bro. Abr. t. werdite 18. (h) Style. 466. (i) Ibid. 138. (k) 1 Sid. 235. Styl. pract. Reg. 310, 311. edit. 1657. (l) Cro. Eliz. 616. Palm. 325. 1. Brownl. 207. (m) 1 Sid 235. 2 Lev. 140. (n) 4 Burr. 395.

ks

ry

r)

nk

ad

'n.

ed

ng

the

in

ew

of

ge,

iet

lle

ze,

vi-

·'s-

hat

be

rt:

ed.

But

ere

the iny

As.

at

nt)

y is

R-

Ten

1br

Sid.

liz.

ev.

FORMERLY the only remedy, for reverfal of a verdict unduly given, was by writ of attaint; of which we shall speak in the next chapter, and which is at least as old as the instituion of the grand affise by Henry II. (n), in lieu of the Norman trial by battel. Such a fanction was probably thought necessary, when, instead of appealing to Providence for the decision of a dubious right, it was referred to the oath of fallible or perhaps corrupted men. Our ancestors faw, that givry might give an erroneous verdict: and, if they did, hat it cught not finally to conclude the question in the first instance: but the remedy, which they provided, shews the gnorance and ferocity of the times, and the simplicity of the points then usually litigated in the courts of justice. They supposed that, the law being told to the jury by the judge, the proof of fact must be always so clear, that, if they found awrong verdict, they must be wilfully and corruptly perjured. Whereas a juror may find a just verdict from unrighteous motives, which can only be known to the great fearcher of hearts: and he may, on the contrary, find a verdict very manifestly wrong, without any bad motive at all; from inexperience in business, incapacity, misapprehension, inattention ocircumstances, and a thousand other innocent causes. But fuch a remedy as this laid the injured party under an infuperablehardship, by making a conviction of the jurors for perjury the condition of his redress.

THE judges saw this; and very early, even for the missehaviour of jurymen, instead of prosecuting the writ of attaint, awarded a second trial: and subsequent resolutions, for more than a century past, have so extended the benefit of this remedy that the attaint is now as obsolete as the trial by battel which it succeeded: and we shall probably see the revival of the one as soon as the revival of the other. And here I cannot but again admire (p) the wisdom of suffering time to bring to perfection new remedies, more easy and beneficial to the subject; which, by degrees, R 3

⁽⁰⁾ Ipsi regali institutioni eleganter inserta. (Clanv. l. 2. c. 19.)

(

h

01

ot

th

ha

un

10

001

cal

die

pri

fro

for

eft

wh

Th

are

for

the

hav

not

from the experience and approbation of the people, supersede the necessity or desire of using or continuing the old.

IF every verdict was final in the first instance, it would tend to destroy this valuable method of trial, and would drive away all causes of consequence to be decided according to the forms of the imperial law, upon depositions in writing which might be reviewed in a course of appeal. Causes of great importance, titles to land, and large questions of commercial property, come often to be tried by a jury, merely upon the general iffue: where the facts are complicated and intricate, the evidence of great length and variety, and sometimes contradicting each other; and where the nature of the dispute very frequently introduces nice questions and subtilties of law. Either party may be surprized by a piece of evidence, which (had he known of its production) he could have explained or answered; or may be puzzled by a legal doubt, which a little recollection would have folved. In the hurry of a trial the ablest judge may mistake the law, and misdirect the jury: he may not be able so to state and range the evidence as to lay it clearly before them; nor to take off the artful impretions which have been made on their minds by learned and experienced advocates. The jury are to give their opinion instanter; that is, before they separate, eat, or drink. And under these circumstances the most intelligent and best intentioned men may bring in a verdict, which they themfelves upon cool deliberation would wish to reverse.

NEXT to doing right, the great object in the administration of public justice should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of by-standers, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive: he would arraign the determination as manifestly unjust; and abhor a tribunal which he imagined had done him an injury without a possibility of redress.

GRANTING

of

nly

ad

e-

he

vi-

bt,

ea

ice ful

ed

pi-

ık.

nef

m-

on

the

ar-

W-

uld

ra

ıt a

NG

GRANTING a new trial, under proper regulations, cures all these inconveniences, and at the same time preserves interested renders perfect that most excellent method of decision, which is the glory of the English law. A new trial is a relearing of the cause before another jury; but with as little prejudice to either party, as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rule of court for awarding such second trial on the other: and the subsequent verdict, though contrary to the first, imports no title of blame upon the former jury; who, had they possessed their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject; and nothing is now tried but the real merits of the case.

A SUFFICIENT ground must however be laid before the court, to satisfy them that it is necessary to justice that the cause should be farther considered. If the matter be such, as add not or could not appear to the judge who presided at nist print, it is disclosed to the court by assignment: if it arises from what passed at the trial, it is taken from the judge's information; who usually makes a special and minute report of the evidence. Counsel are heard on both sides to impeach or establish the verdict, and the court give their reasons at large why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colours are taken off, and all points of law which arose at the trial we upon sull deliberation clearly explained and settled.

NOR do the courts lend too easy an ear to every application for a review of the former verdict. They must be satisfied, that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case. A new trial is

the best les me minte de sanitremente il de

chi property in an ex, estangent to be of his fix as as a discount five signs of a carte, in the second of the sec

have tolk a twendith next it the expeale.

R 4

not

al

w

wł

WI

wh

do

tot

dif

for

16

tha

66

"

cal

pla

me

CO

not granted, where the value is too inconsiderable to merit a second examination. It is not granted upon nice and formal objections, which do not go to the real merits. It is not granted in cases of strict right or summum jus, where the rigorous exaction of extreme legal justice is hardly reconcileable to conscience. Nor is it granted where the scales of evidence hang nearly equal: that, which leans against the former verdict, ought always very strongly to preponderate.

In granting fuch farther trial (which is matter of found difcretion) the court has also an opportunity, which it seldom fails to improve, of supplying those defects in this mode of trial which were stated in the preceding chapter; by laying the party applying under all fuch equitable terms, as his antagonitt shall defire and mutually offer to comply with : such as the discovery of some facts upon oath; the admission of thers, not intended to be litigated; the production of deeds, books, and papers; the examination of witnesses, infirm or going beyond fea; and the like. And the delay and expense of this proceeding are fo small and trifling, that it never can be moved for to gain time or to gratify humour. The motion must be made within the first four days of the next succeeding term, within which term it is usually heard and decided. And it is worthy observation, how infinitely superior to all others the trial by jury approves itself, even in the very mode of its revision. In every other country of Europe, and in those of our own tribunals which conform themselves to the process of the civil law, the parties are at liberty, whenever they please, to appeal from day to day and from court to court upon questions merely of fact; which is a perpetual fource of obstinate chicane, delay, and expensive litigation (q). With us no new trial is

⁽q) Not many years ago an appeal was brought to the house of lords from the court of session in Scotland, in a cause between Napter and Macsarlane. It was instituted in March 1745; and, (asaster many interlocutory orders and sentences below, appealed from and reheard as far as the course of proceedings would admit) was finally determined in April 1749. the question being only on the property in an ox, adjudged to be of the value of three guineas. No pique or spirit could have made such a cause, in the court of king's bench or common pleas, have lasted a tenth of the time, or have cost a twentieth part of the expense.

al t-

us

to

r

if

m of

n-

ch

of

ls,

or

ıſe

an

on

d-

d.

rs

to

of

of

ſe,

ns

le,

is

d,

of pf-

ed

t)

nc

of

allowed, unless there be a manifest mistake, and the subject matter be worthy of interposition. The party who thinks himself aggrieved may still, if he pleases, have recourse to his writ of attaint after judgment; in the course of the trial he may demur to the evidence, or tender a bill of exceptions. And, if the first is totally laid aside, and the other two very seldom put in practice, it is because long experience has shewn, that a motion for a second trial is the shortest, cheapest, and most effectual cure for all impersections in the verdict: whether they arise from the mistakes of the parties themselves, of their counsel or attornies, or even of the judge and jury.

2. ARRESTS of judgment arise from intrinsic causes, appearing upon the face of the record. Of this kind are, first, where the declaration varies totally from the original writ; as where the writ is in debt or detinue, and the plaintiff declares in an action on the case for an assumpsit: for, the original wit out of chancery being the foundation and warrant of the whole proceedings in the common pleas, if the declaration does not pursue the nature of the writ, the court's authority totally fails. Also, secondly, where the verdict materially differs from the pleadings and iffue thereon; as if, in an action for words, it is laid in the declaration that the defendant faid, "the plaintiff is a bankrupt;" and the verdict finds specially that he faid, "the plaintiff will be a bankrupt." Or, thirdly, if the case laid in the declaration is not sufficient in point of law to found an action upon. And this is an invariable rule with regard to arrefts of judgment upon matter of law, "that whatever is alleged in arrest of judgment must be such "matter, as would upon demurrer have been fufficient to over-"turn the action or plea." As if, on an actior for flander in calling the plaintiff a Jew, the defendant denies the words, and ifue is joined thereon; now, if a verdict be found for the plaintiff, that the words were actually spoken, whereby the fact is established, still the defendant may move in arrest of judgment, that to call a man a Jew is not actionable: and, if the court be of that opinion, the judgment shall be arrested, and

never entered for the plaintiff. But the rule will not hold e converso, " that every thing that may be alleged as cause of "densurrer will be good in arrest of judgment :" for if a declaration or plea omits to state some particular circumstance. without proving of which, at the trial, it is impossible to fupport the action or defence, this omission shall be aided by a verdict. As if, in an action of trespass, the declaration doth not allege that the trespass was committed on any certain day(r); or if the defendant justifies, by prescribing for a right of common for his cattle, and does not plead that his cattle were levant and conchant on the land (s); though either of these defects might be good cause to demur to the declaration or plea, yet if the adverse party omits to take advantage of fuch omission in due time, but takes issue, and has a verdict against him, these exceptions cannot after verdict be moved in arrest of judgment. For the verdict ascertains those facts. which before from the inaccuracy of the pleadings might be dubious; fince the law will not suppose, that a jury under the inspection of a judge would find a verdict for the plaintiff or defendant, unless he had proved those circumstances, without which his general allegation is defective (t). Exceptions therefore, that are moved in arrest of judgment, must be much more material and glaring than fuch as will maintain a demurrer: or, in other words, many inaccuracies and omissions, which would be fatal, if early observed, are cured by a fubsequent verdict; and not suffered, in the last stage of a cause, to unravel the whole proceedings. But if the thing omitted be effential to the action or defence, as if the plaintiff does not merely state his title in a defective manner, but fets forth a title that is totally defective in itfelf (u), or if to an action of debt the defendant pleads not guilty instead of mil debet (w), these cannot be cured by a verdict for the plaintiff in the first case, or for the defendant in the second.

IF,

(

⁽r) Carth. 389. (v) Salk. 365.

⁽s) Cro. Jac. 44.

^{(1) 1} Mod. 292.

th

1-

re

fe

01

of

8

ed

s,

be

er

iff h-

ns

be

12

li-

ya

a

ng

n-

ut

an

nil

iff

F,

92.

IF, by the misconduct or inadvertence of the pleaders, the ifue be joined on a fact totally immaterial, or infufficient to determine the right, fo that the court upon the finding cannot know for whom judgment ought to be given; as if, on an action on the case in assumptit against an executor, he pleads that he himself (instead of the testator) made no such promife (x): or if, in an action of debt on bond conditioned to pay money on or before a certain day, the defendant pleads payment on the day (y) (which, if found for the plaintiff, would be inconclusive, as it might have been paid before) in these cases the court will after verdict award a repleader, quod partes replacitent: unless it appears from the whole record that nothing material can possibly be pleaded in any shape whatsoever, and then a repleader would be fruitless (z). And, whenever a repleader is granted, the pleadings must begin de novo at that stage of them, whether it be the plea, replication or rejoinder, &c. 7 wherein there appears to have been the first defect, or deviation from the regular course (a).

If judgment is not by some of these means arrested within the first four days of the next term after the trial, it is then to be entered on the roll, or record. Judgments are the sentence of the law, pronounced by the court upon the matter contained in the record; and are of four sorts. First, where the facts are confessed by the parties, and the law determined by the court; as in case of judgment upon demurrer: secondly, where the law is admitted by the parties, and the facts disputed; as in case of judgment on a verdica: thirdly, where both the fact and the law arising thereon are admitted by the desendant: which is the case of judgments by confession or default: or, lastly, where the plaintiff is convinced that either fact, or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution; which is the case in judgment upon a nonsuit or retraxit.

ant demost here given is not final, the specely inco

⁽x) 2 Ventr. 196. (y) Stra. 994. (2) 4 Burr. 301, 302. (a) Raym. 458. Salk. 579.

th

ni

alv

fire

ag

ple

cog

ma

thi

wh

of

is 1

thin

the

dito

ney

eith

vit

be

jud

ing.

be i

tion " p

THE judgment, though pronounced or awarded by the judges, is not their determination or fentence, but the determination and fentence of the law. It is the conclusion that naturally and regularly follows from the premises of law and fact, which fland thus against him, who hath rode over my corn, I may recover damages by law; but A hath rode over my corn; therefore I shall recover damages against A. If the major proposition be denied, this is a demurrer in law: if the minor, it is then an iffue of fact: but if both be confessed (or determined) to be right, the conclusion or judgment of the court cannot but follow. Which judgment or conclufion depends not therefore on the arbitrary caprice of the judge, but on the fettled and invariable principle of justice. The judgment, in fhort, is the remedy prescribed by law for the redress of injuries; and the suit or action is the vehicle or means of administering it. What that remedy may be, is indeed the refult of deliberation and study to point out, and therefore the style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own; but, " it is considered," consideratum eft per curiam, that the plaintiff do recover his damages, his debt, his possession, and the like: which implies that the judgment is none of their own; but the act of law, pronounced and declared by the court, after due deliberation and enquiry. hats are confessed by the parties, and the

All these species of judgments are either interlocutory or final. Interlocutory judgments are fuch as are given in the middle of a cause, upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the fuit. Of this nature are all judgments for the plaintiff upon pleas in abatement of the fuit or action: in which it is confidered by the court, that the defendant do answer over, respondeat ouster; that is, put in a more fubftantial plea (b). It is easy to observe, that the judgment here given is not final, but merely interlocu-(v) Stra put ... (v) a Brig 3014-301

t

d

r

e

4

11

f

t,

s,

1-

;

tory; for there are afterwards farther proceedings to be had when the defendant hath put in a better answer.

But the interlocutory judgments, most usually spoken of. are those incomplete judgments, whereby the right of the plaintiff is indeed established, but the quantum of damages fuffained by him is not ascertained: which is a matter that cannot be done without the intervention of a jury. As by the old Gothic constitution the cause was not completely finished, till the nembda or jurors were called in " ad executi-"onem decret orum judicii, ad estimationem pretii, damni, lucri, "(c) &c." This can only happen where the plaintiff recovers; for, when judgment is given for the defendant, it is always complete as well as final. And this happens, in the fift place, where the defendant fuffers judgment to go against him by default, or nibil dicit; as if he puts in no plea at all to the plaintiff's declaration: by confession or ognovit actionem, where he acknowleges the plaintiff's demand to be just: or by non fum informatus, when the defendant's attorney declares he has no instructions to fav any thing in answer to the plaintiff, or in defence of his client: which is a species of judgment by default. If these, or any of them, happen in actions where the specific thing sued for s recovered, as in actions of detinue or debt for a fum or thing certain, the judgment is absolutely complete. And therefore it is very usual, in order to strengthen a bond-creditor's security, for the debtor to execute a warrant of attorney to any one, empowering him to confess a judgment by ather of the ways just now mentioned (by nibil dicit, cognovit actionem, or non sum informatus) in an action of debt to be brought by the creditor for the specific sum due: which judgment when confessed, is absolutely complete and binding. But, where damages are to be recovered, a jury must e called in to affes them, unless the defendant, to save charges, will confess the whole damages laid in the declaration: otherwise the entry of the judgment is, " that the "plaintiff ought to recover his damages, (indefinitely) but, " because

⁽c) Stiernhook de jure Gath. l. 1. c. 4.

de

al

52

lai

al

CO

w

ad

W

th

an

de

W

the

" because the court know not what damages the faid plain-" tiff hath fustained, therefore the sheriff is commanded, " that by the oaths of twelve honest and lawful men he en-" quire into the faid damages, and return such inquisition " (when taken) into court." This process is called a write of enquiry: in the execution of which the theriff fits as judge, and tries by a jury, subject to nearly the same law and conditions as the trial by jury at nife prins, what damages the plaintiff hath really sustained; and when their verdict is given, which must assess some damages (but to what amount they please) the sheriff returns the inquisition into court, which is entered upon the roll in manner of a poffec; and thereupon it is considered, that the plaintiff do recover the exact fum of the damages to affelfed. In like manner, when a demurrer is determined for the plaintiff upon an action wherein damages are recovered, the judgment is also incomplete, till a writ of enquiry is awarded to affels damages, and returned; after which the judgment is completely entered.

FINAL judgments are fuch as at once put an end to the action, by declaring that the plaintiff has either entitled himfelf, or has not, to recover the remedy he fues for. In which case if the judgment be for the plaintiff, it is also confidered that the defendant be either amerced, for his willful delay of justice in not immediately obeying the king's writ by rendering the plaintiff his due (d); or be taken up, capiatur, to pay a fine to the king, in case of any forcible injury (e) Though now by flatute 5 & 6 W. & M. c. 12. no writ of capias shall issue for this fine, but the plaintiff shall pay 61. 8d. and be allowed it against the defendant among his other costs. And therefore in judgments in the court of common pleas they enter that the fine is remitted, and in the court of king's bench they now take no notice of any fine of capias at all (f). But if judgment be for the defendant, the it is confidered, that the plaintiff and his pledges of profecet ing be (nominally) amerced for his false suit, and that the defendan

⁽d) 5 Rep. 49.

⁽e) Append. No. II. 5. 4.

⁽f) Salk

n

18

w

a-

r-

at

to

2 :

ren

r.

IC-

n-

es.

n

the

mich

red

0

er-

to e).

0

his

m th

0

et.

the

ant

IL

defendant may go without a day eat fine die, that is, without any farther continuance or adjournment; the king's writ, commanding his attendance, being now fully fatisfied, and his innocence publickly cleared (g).

THUS much for judgments; to which costs are a necessary appendage; it being now as well the maxim of ours as of the civil law, that " victus victori in expensis condemnandus eft (h)." Though the common law did not professedly allow any, the amercement of the vanquished party being his only punishment. The first statute which gave costs, eo nomine, to the demandant in a real action was the statute of Gloucester, 6 Edw. I. c. 1. as did the statute of Marlbridge 12 Hen. III. c. 6. to the defendant in one particular cafe, relative to wardship in chivalry: though in reality costs werealways confidered and included in the quantum of damages, in fuch actions where damages are given; and, even now, costs for the plaintiff are always entered on the roll as ingrease of damages by the court (i). But, because those damages were frequently inadequate to the plaintiff's expenses, the statute of Gloucester orders costs to be also added; and farther directs, that the same rule shall hold place in all cases where the party is to recover damages. And therefore in fuch actions where no damages were then recoverable (as in quare impedit, in which damages were not given till the statute of Westm. 2. 13 Edw. I.) no costs are now allowed (k); unless they have been expressly given by some subsequent statute. The flatute 3 Hen. VII. c. 10, was the first which allowed my costs on a writ of error. But no costs were allowed the defendant in any shape, till the statutes 23 Hen. VIII. c. 19. 4 Jac. I. c. 3, 8 & 9 W. III. c. 11. and 4 & 5 Ann. c. 16. which very equitably gave the defendant, if he prevailed, the fame costs as the plaintiff would have had, in case he had recovered. These costs on both sides are taxed and modented by the prothonotary, or other proper officer of the court.

THE

⁽g) Append. No. III. §. 6. (h) Cod. 3. 1. 13. (i) Append. No. II. §. 4. (k) 10 Rep. 116

THE king (and any person suing to his use) (1) shall neither pay, nor receive costs: for, besides that he is not included under the general words of these statutes, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them. And it feems reasonable to suppose, that the queen-confort participates of the same privilege: for, in actions brought by her, the was not at the common law obliged to find pledges of profecution, nor could be amerced in case there was judgment against her (m). In two other cases an exemption also lies from paying costs. Executors and administrators, when suing in the right of the deceased. shall pay none (n). And paupers, that is such as will swear themselves not worth five pounds, are, by statute 11 Hen. VII. c. 12. to have original writs and subpoenas gratis, and counsel and attorney affigned them without fee; and are excused from paying costs, when plaintiffs, by the statute 23 Hen. VIII. c. 15. but shall fuffer other punishment at the difcretion of the judges. And it was formerly usual to give fuch paupers, if nonfuited, their election either to be whipped or pay the costs (o): though that practice is now disused (p). It feems however agreed, that a pauper may recover cofts. though he pays none; for the counsel and clerks are bound to give their labour to him, but not to his antagonists (q). To prevent also trifling and malicious actions, for words, for affault and battery, and for trespass, it is enacted by statutes 43 Eliz. c. 6. 21 Jac. I. c. 16. and 22 & 23 Car. II. c. 9. 6. 136. that, where the jury who try any of these actions shall give less damages than 40s. the plaintiff shall be allowed no more costs than damages, unless the judge before whom the cause is tried shall certify under his hand on the back of the record, that an actual battery (and not an affault only) was proved, or that in trespass the freehold or title of the land came chiefly in question. Also by statute 4 & 5 W. & M. c. 23. and 8 & 9 W. III. c. 11. if the trespass were committed

⁽¹⁾ Stat. 24 Hen. VIII. c. 8. (m) F. N. B. 101. Co. Litt. 133. (n) Cro. Jac. 229. (o) 1 Sid. 261. 7 Mod. 114. (p) Salk. 506. (q) 1 Equ. Caf. abr. 125.

I.

i-

1-

is

ė,

r,

w

d

er

rs d.

ar n. d c-

re

)-

s,

s,

-

d

) e

d

n

in hunting or sporting by an inferior tradesman, or if it appear to be wilfully and maliciously committed, the plaintiff shall have full costs (r), though his damages as affessed by the jury amount to less than 40s.

AFTER judgment is entered, execution will immediately follow, unless the party condemned thinks himself unjustly aggrieved by any of these proceedings; and then he has his remedy to reverse them by several writs in the nature of appeals, which we shall consider in the succeeding chapter.

OF FRUITNOS INTEREMENTAL OF

(r) See page 214, 215.

of more death in seven so it sollid the

tockey in the series to throw a serie of the satisfact

o de diministrativo per esta de la compania del compania del compania de la compania del compani

of figure dr. bhr chaftown ad runnores and real-main of town

we also to all expression follows for exempt the state of the first of

Filedon 1911 for a locard of there are an american and a series of the s

Train to the tree of A. T. J. and D. . . Toure T.

a probability of some (a consequent probability as land of the

(a) Place L. gam of the About arrains of

and the property of the body of the contract of the brown and the contract of the contract of

array of the country of the country of the country

CHAPTER

and it is small to worshi or vi stance to proud

There is not devision or electrical to the view of er re-

the feetiles in an early and process of they had weet the

Ch.

n th

illov for th

cause ten

four, the o afide form

dence

whet to the any f prior knew

in aff

becau

wide

court

their

houl

1. T

That

bands

out of

down

mead

caft in

that 1

leveri

ing t

(c) 34. Ec Abr. t

CHAPTER THE TWENTY PIFTH.

OF PROCEEDINGS, IN THE NATURE OF APPEALS.

PROCEEDINGS, in the nature of appeals from the proceedings of the king's courts of law, are of various kinds; according to the subject matter in which they are concerned. They are principally three.

I. A WRIT of attaint: which lieth to enquire whether a jury of twelve men gave a false verdict (a); that so the judgment following thereupon may be reversed: and this must be brought in the life-time of him for whom the verdict was given, and of two at least of the jurors who gave it. This lay, at the common law, only upon verdicts in actions for such personal injuries as did not amount to trespass. For in real wrongs the party injured had redress by writ of right; but, after verdict against him in personal suits, he had no other remedy: and it did not lie in actions of trespass, for a very extraordinary reason; because, if the verdict was set aside, the king would lose his sine (b). But by statute Westm. 1. 3 Edw. I. c. 38. it was given in all pleas of land, franchise, or freehold; and, by several subsequent statutes,

⁽a) Finch. L. 484.

⁽b) Bro. Abr. t. attaint. 42.

П

01

n

the reigns of Edward III. (c) and his grandson (d), it was slowed in almost every action, except in a writ of right; for there no attaint lay, either by common law or statute, beause it was determined by the grand affise, consisting of fixam jurors (e).

THE jury who are to try this false verdict must be twenty fur, and are called the grand jury; for the law wills not that he oath of one jury of twelve men should be attainted or set ade by an equal number, nor by less indeed than double the former. And he that brings the attaint can give no other evitince to the grand jury, than what was originally given to the thit. For as their verdict is now trying, and the question is whether or no they did right upon the evidence that appeared othem, the law judged it the highest absurdity to produce my fubsequent proof upon such trial, and to condemn the mor jurisdiction for not believing evidence which they never bew. But those against whom it is brought are allowed naffirmance of the first verdict, to produce new matter (f): ecause the petit jury may have formed their verdict upon widence of their own knowlege, which never appeared in ourt; and because very terrible was the judgment which the common law inflicted upon them, if the grand jury found their verdict a false one. The judgment was, 1. That they hould lose their liberam legem, and become for ever infamous, I. That they should forfeit all their goods and chattels. That their lands and tenements should be seised into the king's lands. 4. That their wives and children should be thrown out of doors. 5. That their houses should be rased and thrown down. 6. That their trees should be rooted up. 7. That their meadows should be ploughed. 8. That their bodies should be aft into gaol. 9. That the party should be restored to all hat he lost by reason of the unjust verdict. But as the everity of this punishment had its usual effect in preventing the law from being executed, therefore by the statute II Hen.

⁽c) Stat. 1 Edw. III. c. 6. 5 Edw. III. c. 7. 28 Edw. III. c. 8. 34 Edw. III. c. 7. (d) Stat. 9 Ric. II. c. 3. (e) Bro. 4br. t. atteint. 42. (f) Finch. L. 486.

dar

ter

lies

the

cou

hea

ma

the

and

alfo

fir

pen

apa

aga

ter,

wh

hav

pre

but

fun

fior

and

ofe

ror

me

lan

evi

the

11 Hen. VII. c. 24. revived by 23 Hen. VIII. c. 3. a more moderate punishment was inflicted upon attainted jurors; viz. perpetual infamy, and, if the cause of action were above 40 1. value, a forfeiture of 20 1. apiece by the jurors; or, if under 40 1. then 51. apiece; to be divided between the king and the party injured. So that a man may now bring an attaint either upon the statute or at common law, at his election (g); and in both of them may reverse the former judgment. But the practice of fetting aside verdicts upon motion and granting new trials, has fo superfeded the use of both forts of attaints, that I have not observed any instance of an attaint in our books, later than the fixteenth century (h). By the old Gothic constitution indeed no certificate of a judge was allowed, in matters of evidence, to countervail the oath of the jury: but their verdict, however erroneous, was absolutely final and conclusive. "Testes sunt de judice et de actis " ejus; judex vero de ipsis vicissim testari non potest, vere an " falso jurent : qualicunque enim eorum assertioni standum est et " judicandum." Yet they had a proceeding, from whence our attaint may be derived. If, upon a lawful trial before a fuperior tribunal, they were found to have given a false verdict, they were fined, and rendered infamous for the future. " Si tamen evidenti argumento falsum jurasse convincantur (id " quod superius judicium cognoscere debet) mulctantur in bonis, " de caetero perjuri et intestabiles (i)."

II. An audità querela is where a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge, which has happened since the judgment: as if the plaintiss has given him a general release; or if the defendant hath paid the debt to the plaintiss, without entering satisfaction on the record. In these and the like cases, wherein the defendant hath good matter to plead, but hath had no opportunity of pleading it, (either at the beginning of the suit, or puis darrein

⁽g) 3 Infl. 164. (h) 1593. M. 35 & 36 Eliz. Cro. 4 Eliz. 309. (i) Stiernhook. de jure Goth. l. 1. c. 4.

S

t

e

S

15

et

ce

a r-

e.
id

5,

m

of

ep-

m

bt

d.

th

of

in

iz.

larrein continuance, which, as was shewn in a former chapter (k), must always be before judgment) an audita querela lies, in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It is a writ directed to the murt, stating that the complaint of the defendant hath been heard, audita querela defendentis, and then setting out the matter of the complaint, it at length enjoins the court to call the parties before them, and, having heard their allegations and proofs, to cause justice to be done between them (1). It allolies for bail, when judgment is obtained against them by fire facias to answer the debt of their principal, and it happens afterwards that the original judgment against their prinapal is reversed: for here the bail, after judgment had gainst them, have no opportunity to plead this special matter, and therefore they shall have redress by audita querela (m); which is a writ of a most remedial nature, and seems to have been invented, left in any case there should be an oppreffive defect of justice, where a party has a good defence, but by the ordinary forms of law had no opportunity to make it. But the indulgence now shewn by the courts in granting a fummary relief upon motion, in cases of such evident oppresfion (n), has almost rendered useless the writ of audita querela, and driven it quite out of practice.

III. But, thirdly, the principal method of redress for ermeous judgments in the king's courts of record is by writ ferror to some superior court of appeal.

A WRIT of error (o) lies for some supposed mistake in the proceedings of a court of record; for, to amend errors in a base court, not of record, a writ of salse judgment lies (p). The writ of error only lies upon matter of law arising upon the face of the proceedings; so that no evidence is required to substantiate or support it: and there is no method of reversing an error in the determina-

⁽k) See page 317. (l) Finch. L. 488. F. N. B. 102. (m) 1 Roll. Abr. 308. (n) Lord Raym. 439. (o) Append. No. III. §. 6. (p) Finch. L. 484.

Ch.

and

if a

or t

rect

logi

ther

in 1

plea

ine

u q

wer

the

by 1

V

and

Edv

of '

inte

juds

OWI

men

ther

I OI

n to

" fe

" ne

i R

amo

mad

tion

ing

Vate

tion of facts, but by an attaint, or a new trial, to correct the mistakes of the former verdict.

FORMERLY the fuitors were much perplexed by writs of error brought upon very flight and trivial grounds, as miffeellings and other miftakes of the clerks, all which might be amended at the common law, while all the proceedings were in paper (q); for they were then confidered as only in fieri, and therefore subject to the control of the courts. But, when once the record was made up, it was formerly held, that by the common law no amendment could be permitted, unless within the very term in which the judical act so recorded was done: for during the term the record is in the breaft of the court; but afterwards it admitted of no alteration (r). But now the courts are become more liberal; and, where justice requires it, will allow of amendments at any time while the fuit is depending, notwithstanding the record be made up, and the term be past. For they at present consider the proceedings as in fieri, till judgment is given; and therefore that, till then, they have power to permit amendments by the common law: but when judgment is once given and enrolled, no amendment is permitted in any fubsequent term (s). Mistakes are also effectually helped by the statutes of amendment and jeofails: so called, because when a pleader perceives any flip in the form of his proceedings, and acknowleges such error (jeo faile) he is at liberty by those statutes to amend it; which amendment is feldom actually made, but the benefit of the acts is attained by the court's overlooking the exception (t). These statutes are many in number, and the provisions in them too minute to be here taken notice of, otherwise than by referring to the statutes themselves (u); by which all trifling exceptions are so thoroughly guarded against, that writs of error cannot now be maintained, but for some material mistake assigned. THIS

⁽q) 4 Burr. 1099. (r) Co. Litt. 260. (s) Stat. 11Hen. IV. c. 3. (t) Stra. 1011. (u) Stat. 14 Edw. III. c. 6. 9 Hen. V. c. 4 4 Hen. VI. c. 3. 8 Hen. VI. c. 12. & 15. 32 Hen. VIII. c. 30. 18 Eliz. c. 14. 21 Jac. I. c. 13. 16 & 17 Car. II. c. 8. (ftyled in 1 Ventr. 100. an omnipotent act) 4 & 5 Ann. c. 16. 9 Ann. c. 20. g Geo. I. c. 13.

oi if-

h

g

ut.

iai

led

of

u

ice

the up,

ro-

ord

by

n-

rm

of

der

ac-

tes

de.

er-

m-

en

m-

10-

WC

d.

18

en.

II. 8.

9

This is at present the general doctrine of amendments; and its rise and history are somewhat curious. In the early ges of our jurisprudence, when all pleadings were ore tenus, if a slip was perceived and objected to by the opposite party of the court, the pleader instantly acknowleged his error and retified his plea; which gave occasion to that length of dialogue reported in the antient year-books. So liberal were then the sentiments of the crown as well as the judges, that in the statute of Wales, made at Rothelan, 12 Edw. I. the pleadings are directed to be carried on in that principality, the calumpaia verborum, non observata illa dura consustudine, uput cadit a syllaba cadit a tota causa." The judgments were entered up immediately by the clerks and officers of the court; and, if any mis-entry was made, it was rectified by the minutes or the remembrance of the court itself.

WHEN the treatise by Britton was published, in the name and by the authority of the king, (probably about the 13 Idw. I. because the last statutes therein referred to are those f Winchester and Westminster the second) a check seems intended to be given to the unwarrantable practices of fom e indges, who had made false entries on the rolls to cover their own misbehaviour, and had taken upon them by amendments and rafures to falfify their own records. The king herefore declares (v) that " although we have granted to our justices to make record of pleas pleaded before them. ret we will not that their own record shall be a warranty for their own wrong, nor that they may raife their rolls, "nor amend them, nor record them, contrary to their origi-"nal enrollment." The whole of which, taken together, mounts to this, that a record furreptitiously or erroneously made up, to stifle or pervert the truth, should not be a fanction for error; and that a record, originally made up according to the truth of the case, should not afterwards by any prirate rafure or amendment be altered to any finisher purpose.

BUT

Alections challery head, only remain, that they wild the property of

the fourtedard coatury. (Engrequie his herig

t

21

th

of

16

an

en lei

itf

ar

err

fuc

(er

the

du

tim

hav

mif

can

thre

fely

case

it w

cou

V

()

See

Edw

Rugg

plead

But when afterwards king Edward, on his return from his French dominions in the seventeenth year of his reign, after upwards of three years absence, found it necessary (or convenient) to prosecute his judges for their corruption and other mal-practices, the perversion of judgmenta (w) by erasing and altering records was one of the causes assigned for the heavy punishments inflicted upon almost all the king's justices, even the most able and upright (x). The severity of which proceedings seems so to have alarmed the succeeding judges, that, through a fear of being said to do wrong, they hesitated at doing that which was right. As it was so hazardous to alter a record, even from compassionate motives, (as happened in Hengham's case, which in strictness was

(w) Judicii perverterunt, et in aliis erraverunt. (Matth. Weft, (x) Among the other judges, fir Ralph Heng-A. D. 1289.) ham chief justice of the king's bench is faid to have been fined 7000 marks, fir Adam Stratton chief baron of the exchequer 34000 marks, and Thomas Wayland chief justice of the common pleas to have been attainted of felony, and to have abjured the realm, with a forfeiture of all his estates; the whole amount of the forfeitures being upwards of 100000 marks, or 70000 pounds. (3 Pryn. Rec. 401, 402.) An incredible fum in those days, before paper credit was in use, and when the annual falary of a chief justice was only fixty marks. (Clauf. 6. Edw. I. m. 6. Dugd. chron. fer. 26.) The charge against fir Ralph Hengham (a very learned judge, to whom we are obliged for two excellent treatifes of practice) was only according to a tradition that was current in Richard the third's time, (Year-book. M.2 Ric. III 10.) his altering out of mere compasfion a fine, which was fet upon a very poor man, from 135. 4d. to 6s. 8d. for which he was fined 800 marks; a more probable fum than 7000. It is true, the book calls the judge so punished Ingham and not Hengham: but I find no judge of the name of Ingham in Dugdale's Series; and fir Edward Coke (4. Inft. 255.) and fir Mathew Hale (I P. C. 646.) understand it to have been the chief justice. And certainly his offence was nothing very atrocious or difgraceful: for though removed from the king's bench at this time (together with the rest of the judges) we find him about twelve years afterwards made chief justice of the common pleas, Pat. 29 Edav I. m. 7. Dugd. cbron. fer: 32.) in which office he continued till his death in 2 Edw. II. (Clauf. 1. Edw. II. m. 19. Pat. 2 Edw. II, p. 1. m. 9. Dugd. 34. Selden. pref. to Hengham.) There is an appendix to this tradition; remembered by justice Southcote in the reign of queen Elizabeth; (3. Inft. 72. 4 Inft. 255) that with this fine of chief justice Hengham a clock house was built at Westminfter, and furnished with a clock, to be heard into Westminster-hall. Upon which story I shall only remark, that the first introduction of clocks was not till an hundred years afterwards, about the end of the fourteenth century. (Encyclopedie, tit, horlege.)

1 m m e i d bo so co

as

g-00

00

to th

ec.

128

cty

he

ac-

ne,

af-

to

ans

in

lauf-

lif

me

lve

29 ied w.

211

he

his

in-

of of

certainly indefensible) they resolved not to touch a record any more; but held that even palpable errors, when enrolled and the term at an end, were too facred to be rectified or called in question: and, because Britton hath forbidden all criminal and clandestine alterations, to make a record speak a falsity, they conceived that they might not judicially and publickly amend it, to make it agreeable to truth. In Edward the third's time indeed, they once ventured (upon the certificate of the justice in eyre) to estreat a larger fine than had been recorded by the clerk of the court below (y): but, instead of amending the clerk's erroneous record, they made a fecond enrollment of what the justice had declared ore tenus; and left it to be settled by posterity in which of the two rolls that absolute verity resides, which every record is said to import in itelf (z). And, in the reign of Richard the sccond, there are instances (a) of their refusing to amend the most palpable errors and mis-entries, unless by the authority of parliament.

To this real fullenness, but affected timidity, of the judges, such a narrowness of thinking was added, that every slip (even of a syllable or a letter) (b) was now held to be fatal to the pleader, and overturned his client's cause (c). If they durst not, or would not, set right mere formal mistakes at any time upon equitable terms and conditions, they at least should have held, that trissing objections were at all times inadmissible; and that more solid exceptions in point of form came too late when the merits had been tried. They might through a decent degree of tenderness, have excused themselves from amending in criminal, and especially in capital, cases. They needed not have granted an amendment, where it would work an injustice to either party; or where he could not be put in as good a condition, as if his adversary Vol. III.

⁽y) 1 Hal. P. C. 647. (z) 1 Leon. 183. Co. Litt. 117. See page 331. (a) 1 Hal. P. C. 648. (b) Stat. 14 Edw. III. c. 6. (c) In those days it was strictly true, what Ruggle (in his ignoramus) has humorously applied to more modern pleadings; "in nostra lege unum comma evertit totum placitum."

had made no mistake. And, if it was feared that an amendment after trial might subject the jury to an attaint, how easy was it to make waiving the attaint the condition of allowing the amendment! And yet these were among the absurd reasons alleged for never suffering amendments at all (d)!

THE precedents then fet were afterwards most scrupulously followed (e),-to the great obstruction of justice, and ruin of the fuitors; who have formerly fuffered as much by these obstinate scruples and literal strictness of the courts, as they could have done even by their iniquity. After verdicts and judgments upon the merits, they were frequently reverfed for flips of the pen or mif-spellings: and justice was perpetually intangled in a net of mere technical jargon. The legislature hath therefore been forced to interpose, by no less than twelve statutes, to remedy these opprobrious niceties: and its endeavours have been of late so well seconded by judges of a more liberal cast, that this unseemly degree of strictness is almost entirely eradicated; and will probably in a few years be no more remembered, than the learning of effoins and defaults, or the counterpleas of voucher, are at present. But, to return to our writs of error.

If a writ of error be brought after verdict, he that brings the writ, or that is plaintiff in error, must in most cases find substantial pledges of prosecution, or bail (f) to prevent delays by frivolous pretences to appeal: and for securing payment of costs and damages, which are now payable by the vanquished party in all, except a few particular instances, by virtue of the several statutes recited in the margin (g).

A WRIT of error lies from the inferior courts of record in England into the king's bench (h), and not into the common pleas,

⁽d) Styl. 107. (e) 8 Rep. 156, &c. (f) Stat. 3 Jac. I c. 8. 13 Car. II. c. 2. 16 & 17 Car. II. c. 8. (g) 3 Hen. VII. c. 10. 13 Car. II. c. 2. 8 & 9 W. III. c. 11. 4 & 5 Ann. c. 16. (h) See chap. 4.

pleas (i). Also from the king's bench in Ireland to the king's bench in England. It likewise may be brought from the common pleas at Westminster to the king's bench; and then from the king's bench the cause is removeable to the house of lords. From proceedings on the law fide of the exchequer a writ of error lies into the court of exchequer chamber before the lord chancellor, lord treasurer, and the judges of the court of king's bench and common pleas: and from thence it lies to the house of peers. From proceedings in the king's bench, in debt, detinue, covenant, account, case, ejectment, or trespass, originally begun therein (except where the king is party) it lies to the exchequer chamber, before the justices of the common pleas, and barons of the exchequer; and from thence also to the house of lords (k): but where the proceedings in the king's bench are commenced by original writ, fued out of chancery, (which must be for some forcible injury, in which the king is supposed to be a party, in order to punish the trespass committed in a criminal manner) this takes the case out of the general rule laid down by the statute; so that the writ of error then lies, without any intermediate stage of appeal, directly to the house of lords, the dernier resort for the ultimate decision of every civil action. Each court of appeal, in their respective stages, may, upon hearing the matter of law in which the error is affigned, reverse or affirm the judgment of the inferior courts; but none of them are final, fave only the house of peers, to whose judicial decisions all other tribunals must therefore submit and conform their own. And thus much for reverfal or affirmance of judgments by writs in the nature of appeals.

(i) Finch. L. 480. Dyer. 250.

(k) Stat. 27 Eliz. c. 8.

plante de la contraction de la

CHAPTER THE TWENTY SIXTH.

Armeni da esta de la calanda especial y el tradecesar de la calanda especial.

OF EXECUTION.

If the regular judgment of the court, after the decision of the suit, be not suspended, superseded, or reversed, by one or other of the methods mentioned in the two preceding chapters, the next and last step is the execution of that judgment; or, putting the sentence of the law in force. This is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is had or recovered.

If the plaintiff recovers in an action real or mixed, wherein the seisin or possession of land is awarded to him, the writ of execution shall be an habere facias seisinam, or writ of seisin, of a freehold; or an habere facias possessionem, or writ of possession (a), of a chattel interest (b). These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintist of the land so recovered: in the execution of which, the sheriff may take with him the tosses comitatus, or power of the county; and may justify breaking open doors, if the possession be not quietly delivered. But if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of a door, in the name of seisin, is sufficient execution of the writ. Upon a presentation to a benefice recovered in a quare impedit, or assist of darrein presentation.

⁽a) Append. No. II. §. 4.

⁽b) Finch, L. 470.

EXECU-

presentment, the execution is by a writ de clerico admittendo; directed, not to the sheriff, but to the bishop or his metropolitan, requiring them to admit and institute the clerk of the plaintiff.

In other actions where the judgment is, that fomething in special be done or rendered by the defendant, then, in order to compel him so to do, and to see the judgment executed, a special writ of execution issues to the sheriff according to the nature of the case. As upon an assise or quod permittat prosernere for a nusance, where one part of the judgment is quod amoveatur, a writ goes to the sheriff to abate it at the charge of the party, which likewise issues even in case of an indictment (c). Upon a replevin the writ of execution is the writ de retorno habendo (d); and, if the distress be eloigned, the defendant shall have a capias in withernam (e), but, on the plaintiff's tendering the damages and submitting to a fine, the process in withernam shall be stayed (f). In detinue, after judgment the plaintiff shall have a distringus, to compel the defendant to deliver the goods, by repeated diffresses of his chattels (g); or else a scire facias against any third person in whose hands they may happen to be, to shew cause why they should not be delivered: and, if the defendant still continues obstinate, the sheriff shall summon an inquest to ascertain the plaintiff's damages, which shall be levied (like other damages) by seifure of the person or goods of the defendant. So that, after all, in replevin and detinue, (the only actions for recovering specific possession of personal chattels) if the wrongdoer be very perverse, he cannot be compelled to a restitution of the identical thing taken or detained; but he still has his election, to deliver the goods, or their value (h): an imperfection in the law, that refults from the nature of personal property, which is easily concealed or conveyed out of the reach of justice, and not, like land and other real property, always amesnable to the magistrate.

S 3

⁽c) Comb. 10. (d) See page 150. (e) See page 148. (f) 2 Leon. 174. (g) 1 Roll. Abr. 757. Rastal. Entr. 215. (h) Keilw. 64.

h

0

0

th

V

th

pr

EXECUTIONS in actions where money only is recovered, as a debt or damages, (and not any specific chattel) are of five forts: either against the body of the defendant; or against his goods and chattels; or against his goods and the profits of his lands; or against his goods and the possession of his lands; or against all three, his body, lands, and goods.

1. THE first of these species of execution, is by writ of capias ad fatisfaciendum (i); which distinguishes it from the former capias, ad respondendum, which lies to compel an appearance at the beginning of a fuit. And, properly fpeaking, this cannot be fued out against any but such as were liable to be taken upon the former capias (k). The intent of it is to imprison the body of the debtor, till satisfaction be made for the debt, costs, and damages: it therefore doth not lie against any privileged persons, peers or members of parliament, nor against executors or administrators, nor against fuch other persons as could not be originally held to bail. And fir Edward Coke also gives us a fingular instance (1), where a defendant in 14 Edw. III. was discharged from a capias because he was of so advanced an age, quod poenam imprisonamenti subire non potest. If an action be brought against an husband and wife for the debt of the wife, when fole, and the plaintiff recovers judgment, the capias shall iffue to take both the husband and wife in execution (m): but, if the action was originally brought against herself, when sole, and pending the fuit she marries, the capias shall be awarded against her only, and not against her husband (n). Yet, if judgment be recovered against an husband and wife for the contract, nay even for the personal misbehaviour (o), of the wife during her coverture, the capias shall issue against the husband only: which is one of the greatest privileges of English wives.

⁽i) Append. No. III. §. 7. (k) 3 Rep. 12. (l) 1 Inst. 289. (m) Moor, 704. (n) Cro. Jac. 323. (o) Cro. Car. 513.

e

-

The writ of capias ad satisfaciendum is an execution of the highest nature, in as much as it deprives a man of his liberty, till he makes the fatisfaction awarded; and therefore, when a man is once taken in execution upon this writ, no other process can be fued out against his lands or goods. Only, by flatute 21 Jac. I. c. 24. if the defendant dies, while charged in execution upon this writ, the plaintiff may, after his death, fue out new executions against his lands, goods, or chattels. The writ is directed to the sheriff, commanding him to take the body of the defendant and have him at Westminster, on a day therein named, to make the plaintiff satisfaction for his demand. And, if he does not then make satisfaction, he must remain in custody till he does. This writ may be sued . out, as may all other executory process, for costs, against a plaintiff as well as a defendant, when judgment is had against him.

WHEN a defendant is once in custody upon this process, heis to be kept in arcta et salva custodia: and, if he be afterwards seen at large, it is an escape; and the plaintiff may have an action thereupon against the sheriff for his whole debt. For though, upon arrests and what is called mesne process, being such as intervenes between the commencement and end of a fuit (p), the sheriff, till the statute 8 & 9 W. III. c. 27. might have indulged the defendant as he pleased, so as he produced him in court to answer the plaintiff at the return of the writ: yet, upon taking in execution, he could never give any indulgence; for, in that case, confinement is the whole of the debtor's punishment, and of the satisfaction made to the creditor. Escapes are either voluntary, or negligent. Voluntary are fuch as are by the express consent of the keeper, after which he never can retake his prisoner again (q), (though the plaintiff may retake him at any time) (r) but the sheriff must answer for the debt. Negligent escapes are where the prisoner escapes without his keeper's knowlege or consent; and then upon fresh pursuit the defendant may be retaken, S 4

⁽p) See pag. 279. (q) 3 Rep. 52. 1 Sid. 330. (r) Stat. 8 & 9 W. III. c. 27.

and the sheriff shall be excused, if he has him again before any action brought against himself for the escape (s). A rescue of a prisoner in execution, either going to gaol or in gaol, or a breach of prison, will not excuse the sheriff from being guilty of and answering for the escape; for he ought to have fufficient force to keep him, feeing he may command the power of the county (t). But by statute 32 Geo. II. c. 28. if a defendant, charged in execution for any debt less than rook. will furrender all his effects to his creditors, (except his apparel, bedding, and tools of his trade, not amounting in the whole to the value of 10 l.) and will make oath of his punctual compliance with the statute, the prisoner may be discharged, unless the creditor insists on detaining him; in which case he shall allow him 2 s. 4 d. per week, to be paid on the first day of every week, and on failure of regular payment the prifoner shall be discharged. Yet the creditor may at any future time have execution against the lands and goods of the defendant, though never more against his person. And, on the other hand, the creditors may, as in case of bankruptcy, compel (under pain of transportation for seven years) such debtor charged in execution for any debt under 100l. to make a discovery and surrender of all his effects for their benefit; whereupon he is also entitled to the like discharge of his person.

IF a capias ad fatisfaciendum is sued out, and a non est inventus is returned thereon, the plaintiss may sue out a process against the bail, if any were given: who, we may remember, stipulated in this triple alternative, that the defendant should, if condemned in the suit, satisfy the plaintiss his debt and costs; or, that he should surrender himself a prisoner; or, that they would pay it for him: as therefore the two former branches of the alternative are neither of them complied with, the latter must immediately take place (u). In order to which a writ of scire facias may be sued out against the bail, commanding them to shew cause why the plaintiff should not have execution against them

⁽s) F. N. B. 130. (t) Cro. Jac. 419. (u) Lutw. 1269-

e

1

e

y

)-

re

1-

he

y,

b-

a

t;

n.

n-

ess m-

int

his

a

re-

ei-

ely

ay use

em

for

9-

for his debt and damages: and on fuch writ, if they shew no fufficient cause, or the defendant does not surrender himself on the day of the return, or of shewing cause (for afterwards is not sufficient) the plaintiff may have judgment against the bail, and take out a writ of capias ad satisfaciendum, or other process of execution against them.

- 2. THE next species of execution is against the goods and chattels of the defendant; and is called a writ of fieri facias (w), from the words in it where the sheriff is commanded. quod fieri faciat de bonis, that he cause to be made of the goods and chattels of the defendant the fum or debt recovered. This lies as well against privileged persons, peers, &c. as other common persons; and against executors or administrators with regard to the goods of the deceased. The sheriff may not break open any outer doors (x), to execute either this, or the former, writ: but must enter peaceably; and may then break open any inner door, belonging to the defendant, in order to take the goods (y). And he may fell the goods and chattels (even an estate for years, which is a chattel real) (z) of the defendant, till he has raised enough to fatisfy the judgment and costs: first paying the landlord of the premises, upon which the goods are found, the arrears of rent then due, not exceeding one year's rent in the whole (a). If part only of the debt be levied on a fieri facias, the plaintiff may have a capias ad satisfaciendum for the residue (b).
- 3. A THIRD species of execution is by writ of levari facias; which affects a man's goods and the profits of his lands, by commanding the sheriff to levy the plaintiff's debt on the lands and goods of the defendant; whereby the sheriff may seise all his goods, and receive the rents and profits of his lands, till satisfaction be made to the plaintiff (c). Little use is now made of S 5

(w) Append. No. III. §. 7. (x) 5 Rep. 92, (y)
Palm. 54. (z) 8 Rep. 171. (a) Stat. 8 Ann. c. 14.
(b) 1 Roll. Abr. 904. Cro. Eliz. 344. (c) Finch. L. 471.

this writ; the remedy by elegit, which takes possession of the lands themselves, being much more effectual. But of this species is a writ of execution proper only to ecclesiastics; which is given when the sheriff, upon a common writ of execution sued, returns that the defendant is a benefice clerk, not having any lay see. In this case a writ goes to the bishop of the diocese, in the nature of a levari or sieri facias (d), to levy the debt and damages de bonis ecclesiasticis, which are not to be touched by lay hands: and thereupon the bishop sends out a sequestration of the profits of the clerk's benefice, directed to the churchwardens, to collect the same and pay them to the plaintiss, till the sum be raised (e).

4. The fourth species of execution is by the writ of elegit; which is a judicial writ given by the statute Westm. 2. 13 Edw. I.c. 18. either upon a judgment for a debt, or damages; or upon the forfeiture of a recognizance taken in the king's court. By the common law a man could only have fatisfaction of goods, chattels, and the present profits of lands, by the two last mentioned writs of fieri facias, or levari facias; but not the possession of the lands themselves: which was a natural consequence of the feodal principles, which prohibited the alienation, and of course the incumbring of the fief with the debts of the owner. And, when the restriction of alienation began to wear away, the consequence still continued; and no creditor could take the possession of lands, but only levy the growing profits: so that, if the defendant aliened his lands, the plaintiff was oufted of his remedy. The statute therefore granted this writ, (called an elegit, because it is in the choice or election of the plaintiff whether he will fue out this writ or one of the former) by which the defendant's goods and chattels are not fold but only appraised, and all of them (except oxen and beafts of the plough) are delivered to the plaintiff, at fuch reasonable appraisement and price, in part of fatisfaction of his debt. If the goods are

⁽d) Registr. orig. 300. judic. 22, 2 Inft. 4. (e) 2 Burn. eccl. law. 329.

F

e

n

t

-

r

e

e

nt

re

n.

not sufficient, then the moiety or one half of his freehold lands, whether held in his own name, or by any other in trust for him (f), are also to be delivered to the plaintiff; to hold, till out of the rents and profits thereof the debt be levied, or till the defendant's interest be expired: as, till the death of the defendant, if he be tenant for life or in tail. During this period the plaintiff is called tenant by elegit, of whom we spoke in a former part of these commentaries (g). We there observed that till this statute, by the antient common law, lands were not liable to be charged with, or feifed for, debts; because by this means the connection between lord and tenant might be deftroyed, fraudulent alienations might be made, and the services be transferred to be performed by a stranger; provided the tenant incurred a large debt, sufficient to recover the land. And therefore, even by this statute only one half was, and now is, subject to execution; that out of the remainder sufficient might be left for the lord to distrein upon for his services. And, upon the same feodal principle, copyhold lands are at this day not liable to be taken in execution upon a judgment (h). But, in case of a debt to the king, it appears by magna carta, c. 8. that it was allowed by the common law for him to take possession of the lands till the debt was paid. For he, being the grand superior and ultimate proprietor of all landed estates, might seise the lands into his own hands, if any thing was owing from the vafal; and could not be faid to be defrauded of his fervices, when the ouster of the vasal proceeded from his own command. This execution, or feifing of lands by elegit, is of so high a nature, that after it the body of the defendant cannot be taken: but if execution can only be had of the goods, because there are no lands, and fuch goods are not suffieient to pay the debt, a capias ad satisfaciendum may then be had after the elegit: for fuch elegit is in this case no more in effect than a fieri facias (i). So that body and goods may be taken in execution, or land and goods; but not body and land too,

⁽f) Stat. 29 Car. II. c. 3. (g) Book II. ch. 10. (h) a Roll. Abr. 888. (i) Hob. 58.

too, upon any judgment between subject and subject in the course of the common law. But

s. UPON fome profecutions given by statute; as in the case of recognizance or debts acknowleged on statutes merchant, or statutes staple; pursuant to the statutes 13 Edw. I. de mercatoribus, and 27 Edw. III. c. 9. upon forfeiture of these, the body, lands, &c. to be appraised to their full extended value, before he delivers them to the plaintiff, that it may be certainly known how foon the debt will be fatisfied (k). And by statute 33 Hen. VIII. c. 39. all obligations made to the king shall have the same force, and of consequence the fame remedy to recover them, as a statute staple: though indeed, before this statute, the king was entitled to fue out execution against the body, lands, and goods of his accountant or debtor (1). And his debt shall, in fuing out execution. be preferred to that of every other creditor, who hath not obtained judgment before the king commenced his fuit (m), The king's judgment also affects all lands, which the king's debtor hath at or after the time of contracting his debt, or which any of his officers mentioned in the statute 13 Eliz. c. 4. hath at or after the time of his entring on the office: fo that, if such officer of the crown alienes for a valuable consideration, the land shall be liable to the king's debt, even in the hands of a bona fide purchaser; though the debt due to the king was contracted by the vendor many years after the alienation (n). Whereas judgments between subject and fubject related, even at common law, no farther back than the first day of the term in which they were recovered, in respect of the lands of the debtor; and did not bind his goods and chattels, but from the date of the writ of execution. And now, by the statute of frauds. 29 Car II. c. 3. the judgment shall not bind the land in the hands of a bona

⁽k) F. N. B. 131. (l) 3 Rep. 12. (m) Stat. 33 Hen. VIII. c. 29. (n) 10 Rep. 55. 56:

e

t

t

r

ò

0

er

k

d

c.

ea

n,

bona fide purchaser, but only from the time of actually signing the same; nor the goods in the hands of a stranger, or a purchaser (0), but only from the actual delivery of the writ to the sheriff.

THESE are the methods which the law of England has pointed out for the execution of judgments: and when the plaintiff's demand is fatisfied, either by the voluntary payment of the defendant, or by this compulfory process, or otherwise, fatisfaction ought to be entered on the record, that the defendant may not be liable to be hereafter harraffed a fecond time on the same account. But all these writs of execution must be fued out within a year and a day after the judgment is entered; otherwise the court concludes prima facie that the judgment is satisfied and extinct: yet however it will grant a writ of scire facias in pursuance of statute Westm. 2. 13 Edw. I. c. 45. for the defendant to fnew cause why the judgment should not be revived, and execution had against him; to which the defendant may plead fuch matter as he has to allege, in order to shew why process of execution should not be issued: or the plaintiff may still bring an action of debt, founded on this dormant judgment, which was the only method of revival allowed by the common law (p).

In this manner are the several remedies given by the English law for all forts of injuries, either real or personal, administred by the several courts of justice, and their respective officers. In the course therefore of the present volume we have, sirst, seen and considered the nature of remedies, by the mere act of the parties, or mere operation of law, without any suit in courts. We have next taken a view of remedies by suit or action in courts: and therein have contemplated, first, the nature and species of courts, instituted for the redress of injuries in general; and then have shewn in what particular courts application must be made for the redress of particular injuries, or the doctrine of jurisdictions and

CI

w

of

lic

ha

de

ou

T

of

en

an

Wa

ted

CO

iu

be

de

the

mi

lit

wl

ba

th

fo

W

qu

ne

pr

by

(r

th

fu

do

and cognizance. We afterwards proceeded to confider the nature and distribution of wrongs and injuries, affecting every species of personal and real rights, with the respective remedies by fuit, which the law of the land has afforded for every possible injury. And, lastly, we have deduced and pointed out the method and progress of obtaining such remedies in the court's of justice : proceeding from the first general complaint or original writ; through all the stages of process, to compel the defendant's appearance; and of pleading, or formal allegation on the one fide, and excuse or denial on the other; with the examination of the validity of fuch complaint or excuse, upon demurrer; or the truth of the facts alleged and denied, upon isue joined, and its several trials; to the judgment or sentence of the law, with respect to the nature and amount of the redress to be specifically given : till, after considering the suspension of that judgment by writs in the nature of appeals, we arrived at its final execution; which puts the party in specific possession of his right by the intervention of ministerial officers, or else gives him an ample fatisfaction, either by equivalent damages, or by the confinement of his body, who is guilty of the injury complained of.

THIS care and circumspection in the law, --- in providing that no man's right shall be affected by any legal proceeding without giving him previous notice, and yet that the debtor shall not by receiving such notice take occasion to escape from justice; in requiring that every complaint be accurately and precifely afcertained in writing, and be as pointedly and exactly answered; in clearly stating the question either of law or of fact; in deliberately resolving the former after full argumentative discussion, and indisputably fixing the latter by a diligent and impartial trial; in correcting fuch errors as may have arisen in either of those modes of decision, from accident, mistake, or surprize; and in finally enforcing the judgment, when nothing can be alleged to impeach it;--this anxiety to maintain and restore to every individual the enjoyment of his civil rights, without intrenching upon those of any other individual in the nation, this parental folicitude which

d

n

-

0

e

S

le

n

h

le

g

g

đ

V

1

which pervades our whole legal constitution, is the genuine offspring of that spirit of equal liberty which is the fingular felicity of Englishmen. At the same time it must be owned to have given an handle, in some degree, to those complaints of delay in the practice of the law, which are not wholly without foundation, but are greatly exaggerated beyond the truth. There may be, it is true, in this, as in all other departments of knowlege, a few unworthy professors: who study the science of chicane and fophistry rather than of truth and justice; and who, to gratify the spleen, the dishonesty, and wilfulness of their clients, may endeavour to screen the guilty by an unwarrantable use of those means which were intended to protect the innocent. But the frequent disappointments and the constant discountenance, that they meet with in the courts of justice, have confined these men (to the honour of this age be it spoken) both in number and reputation to indeed a very despicable compass.

YET fome delays there certainly are, and must unavoidably be, in the conduct of a fuit, however defirous the parties and their agents may be to come to a speedy determination. These arise from the same original causes as were mentioned in examining a former complaint (q); from liberty, property, civility, commerce, and an extent of populous territory: which whenever we are willing to exchange for tyranny, poverty, barbarism, idleness, and a barren defart, we may then enjoy the same dispatch of causes that is so highly extolled in some foreign countries. But common sense and a little experience will convince us, that more time and circumspection are requifite in causes, where the fuitors have valuable and permanent rights to lose, than where their property is trivial and precarious, and what the law gives them to-day, may be feifed by their prince to-morrow. In Turkey, fays Montesquieu (r), where little regard is shewn to the lives or fortunes of the subject, all causes are quickly decided: the basha, on a fummary hearing, orders which party he pleases to be bastinadoed, and then fends them about their business. But in free **states**

⁽q) See pag. 327.

⁽r) Sp. L. b. 9. ch. 2.

Cl

fui

th

fti

ca

he

ki

th

di

of

it

to

a

0

states the trouble, expense, and delays of judicial proceedings are the price that every subject pays for his liberty: and in all governments, he adds, the formalities of law increase, in proportion to the value which is set on the honour, the fortune, the liberty, and life of the subject.

FROM these principles it might reasonably follow, that the English courts should be subject to more delays than those of other nations; as they fet a greater value on life, on liberty, and on property. But it is our peculiar felicity to enjoy the advantage, and yet to be exempted from a proportionable share of the burthen. For the course of the civil law, to which most other nations conform their practice, is much more tedious than ours; for proof of which I need only appeal to the fuitors of those courts in England, where the practice of the Roman law is allowed in its full extent. And particularly in France, not only our Fortescue (s) accuses (of his own knowlege) their courts of most unexampled delays in administring justice; but even a writer of their own (t) has not scrupled to testify, that there were in his time more causes there depending than in all Europe besides, and some of them an hundred years old. But (not to enlarge upon the prodigious improvements which have been made in the celerity of justice by the disuse of real actions, by the statutes of amendment and jeofails (v), and by other more modern regulations, which it now might be indelicate to remember, but which posterity will never forget) the time and attendance afforded by the judges in our English courts are also greater than those of many other countries. In the Roman calendar there were in the whole year but twenty eight judicial or triverbial (u) days allowed to the practor for hearing causes (w); whereas, with us, one fourth of the year is term time, in which three courts constantly fit for the dispatch of matters of law; besides the very close attendance of the court of chancery for determining

⁽s) De Laud. LL. c. 53. (t) Bodin. de Republ. 1. 6. c. 6. (v) See pag. 406. (u) Otherwise called dies fasti, in quibus licebat praetori fari tria werba, do, dico, addico. (Calv. Len. 285). (w) Spelman of the terms. §. 4. c. 2.

n

f

e

e

0

h

S

t

fuits in equity, and the numerous courts of affife and nifi prius that fit in vacation for the trials of matters of fact. Indeed there is no other country in the known world that hath an infitution fo commodious and so adapted to the dispatch of causes, as our trials by jury in those courts for the decision of facts: in no other nation under heaven does justice make her progress twice in each year into almost every part of the kingdom, to decide upon the spot by the voice of the people themselves, the disputes of the remotest provinces.

AND here this part of our commentaries, which regularly treats only of redress at the common law, would naturally draw to a conclusion. But, as the proceedings in the courts of equity are very different from those at common law, and as those courts are of a very general and extensive jurisdiction, it is in some measure a branch of the task I have undertaken, to give the student some general idea of the forms of practice adopted by those courts. These will therefore be the subject of the ensuing chapter.

CHAPTER

pro then that ings

The to reagan

con or t

crit

to o

unc

his

per

to t

ing

an :

cer

ror

den

con

ceff

(w

the

By

cell

90.

CHAPTER THE TWENTY SEVENTH.

OF PROCEEDINGS IN THE COURTS OF EQUITY.

BEFORE we enter on the proposed subject of the ensuing chapter, viz. the nature and method of proceedings in the courts of equity, it will be proper to recollect the observations, which were made in the beginning of this book (a) on the principal tribunals of that kind, acknowleged by the constitution of England; and to premise a few remarks upon those particular causes, wherein any of them claims and exercises a sole jurisdiction, distinct from and exclusive of the other.

I HAVE already (b) attempted to trace (though very concifely) the history, rise, and progress of the extraordinary court, or court of equity, in chancery. The same jurisdiction is exercised, and the same system of redress pursued, in the equity court of the exchequer, with a distinction however as to some few matters, peculiar to each tribunal, and in which the other cannot interfere. And, first, of those peculiar to the chancery.

1. UPON the abolition of the court of wards, the care which the crown was bound to take, as guardian of its infant tenants, was totally extinguished in every feodal view; but resulted to S

the king in his court of chancery, together with the general protection (c) of all other infants in the kingdom. When therefore a fatherless child has no other guardian, the court of thancery hath a right to appoint one: and, from all proceedings relative thereto, an appeal lies to the house of lords. The court of exchequer can only appoint a guardian ad litem, to manage the defence of the infant if a suit be commenced gainst him; a power which is incident to the jurisdiction of the grey court of justice (d): but when the interest of a minor to momes before the court judicially, in the progress of a cause, or upon a bill for that purpose filed, either tribunal indifficiantiately will take care of the property of the infant.

- 2. As to idiots and lunatics: the king himself used formerly to commit the custody of them to proper committees, in every particular case; but now, to avoid solicitations and the very shadow of undue partiality, a warrant is issued by the king (e) under his royal sign manual, to the chancellor or keeper of his seal, to perform this office for him: and if he acts improperly in granting such custodies, the complaint must be made to the king himself in council (f). But the previous proceedings on the commission, to inquire whether or no the party be an ideot or a lunatic, are on the law-side of the court of chancery, and can only be redressed (if erroneous) by writ of error in the regular course of law.
- 3. The king, as parens patria, has the general superintendence of all charities; which he exercises by the keeper of his conscience, the chancellor. And therefore, whenever it is nevellary, the attorney-general, at the relation of some informant, (who is usually called the relator) files ex officio an information in the court of chancery to have the charity properly established. By statute also 43 Eliz.c. 4. authority is given to the lord chancellor or lord keeper, and to the chancellor of the duchy of Lancaster.

⁽c) F. N. B. 27. (d) Cro. Jac. 641. 2 Lev. 163. T. Jones. 90. (e) See book I. ch. 8. (f) 3 P. Wms. 108.

rafure

nlefs v

after,

evenue

w an

In a

ance

uity.

actic

ers:

em n

ays u

LET

mera

rsev

(k), m.

ange

nglar

ler c

nce find

thof

EQT

dfp

mac

at, 1

at th

if t

be :

Lancaster, respectively, to grant commissions under their se veral feals, to enquire into any abuses of charitable donation and rectify the same by decree; which may be reviewed in the respective courts of the several chancellors, upon exception taken thereto. But, though this is done in the petty bag of fice in the court of chancery, because the commission is the returned, it is not a proceeding at common law, but treated a an original cause in the court of equity. The evidence below is not taken down in writing, and the respondent in his an fwer to the exceptions may allege what new matter he pleafes upon which they go to proof, and examine witnesses in wri ting upon all the matters in iffue: and the court may decre the respondent to pay all the costs, though no such authorit is given by the statute. And, as it is thus considered as an ori ginal cause throughout, an appeal lies of course from th chancellor's decree to the house of peers (g), notwithstanding any loofe opinions to the contrary (h).

4. By the several statutes, relating to bankrupts, a summar jurisdiction is given to the chancellor, in many matters consequential or previous to the commissions thereby directed to be issued; from which the statutes give no appeal.

On the other hand, the jurisdiction of the court of chancery doth not extend to some causes, wherein relief may be had in the exchequer. No information can be brought, in chancery, for such mistaken charities, as are given to the king by the statutes for suppressing superstitious uses. Nor can chancery give any relief against the king, or direct any act to be done by him, or make any decree disposing of or affecting his property; not even in cases where he is a royal trustee (i). Such causes must be determined in the court of exchequer, as a court of revenue; which alone has power over the king's treasure,

⁽g) Duke's char, uses. 6. 128. Corporation of Bursord v. Lenthall. Canc. 9 May, 1743. (h) 2 Vern. 118. (i) Huggins v. Yorkbuildings Company. Canc. 24 Oct. 1740. Reeve v. Attorney-general. Canc. 27 Nov. 1741. Lightburn v. Attorney general. Canc. 2. May, 1743.

ri

ar

be

m

be in

ng

an

to

ng

i).

as

re,

or-

rasure, and the officers employed in its management: nless where it properly belongs to the duchy court of Lanter, which hath also a similar jurisdiction as a court of venue; and, like the other, confifts of both a court of w and a court of equity.

In all other matters, what is faid of the court of equity in ancery, will be equally applicable to the other courts of uity. Whatever difference there may be in the forms of actice, it arises from the different constitution of their offis: or, if they differ in any thing more essential, one of m must certainly be wrong; for truth and justice are alre ays uniform, and ought equally to be adopted by them all.

LET us next take a brief, but comprehensive, view of the the meral nature of equity, as now understood, and practifed in reveral courts of judicature. I have formerly touched upon (k), but imperfectly: it deserves a more complete explicam. Yet, as nothing is hitherto extant, that can give a anger a tolerable idea of the courts of equity subfisting in gland, as diffinguished from the courts of law, the comer of these observations cannot but attempt it with diffince: they, who know them best, are too much employed and time to write; and they, who have attended but little those courts, must be often at a loss for materials.

EQUITY then, in its true and genuine meaning, is the foul Aspirit of all law: positive law is construed, and rational law made, by it. In this, equity is fynonymous to justice; in t, to the true sense and sound interpretation of the rule. tthe very terms of a court of equity and a court of law, as trafted to each other, are apt to confound and mislead us: If the one judged without equity, and the other was not and by any law. Whereas every definition or illustration met with, which now draws a line between the two jurisdictions,

⁽k) Vol I. introd. §. 2, & 3 ad calc.

ord

fro

is n

equ

the

diff

ill

3

tru/ But

tert

alw

Ma

deec

deat

rall.

not

are

rem:

mily

(t) Nod

dictions, by fetting law and equity in opposition to each othe will be found either totally erroneous, or erroneous to a certain degree.

- 1. Thus in the first place it is faid (1), that it is the buff ness of a court of equity in England to abate the rigour of the common law. But no fuch power was contended for. Har was the case of bond creditors, whose debtor devised away h real estate; rigorous and unjust the rule, which put the dev fee in a better condition than the heir (m): yet a court equity had no power to interpofe. Hard is the common la still fubfisting, that land devised, or descending to the hei shall not be liable to simple contract debts of the ancestor devisor (n), although the money was laid out in purchasin the very land; and that the father shall never immediate fucceed as heir to the real estate of the fon (o): but a cou of equity can give no relief; though in both these instance the artificial reason of the law, arising from feodal principle has long ago entirely ceased. The like may be observed of t descent of lands to a remote relation of the whole blood, even their escheat to the lord, in preference to the owner half brother (p); and of the total stop to all justice, by ca fing the parol to demur (q), whenever an infant is fued as he or is party to a real action. In all fuch cases of positive law the courts of equity, as well as the courts of law, must say wi Ulpian (r), " boc quidem perquam durum eft, sed ita lex scri " ta eft."
- 2. It is faid (s), that a court of equity determines according to the spirit of the rule, and not according to the strictness the letter. But so also does a court of law. Both, for instance are equally bound, and equally profess, to interpret status according to the true intent of the legislature. In general laws all cases cannot be foreseen; or, if foreseen, cannot be expressed

⁽¹⁾ Lord Kayms princ. of equit. 44. (m) See Vol. II. ch. 22 pag. 378. (n) *Ibid.* ch. 15. pag. 243, 244. ch. 23. pag. 37 (o) *Ibid.* ch. 14. p. 208. (p) *Ibid.* pag. 227. (q) See pag. 300. (r) Ff. 40. 9. 12. (s) Lord Kayms. princ. of eq. 17

Ш

he

ce

uf

th

lar

y h

ev.

la

nei

r

fin

tel

our

nc

ole tl

ner

cat

he lav

wi

ri

di

s

nc

ier t l

Ted

37

P

apressed: some will arise that will fall within the meaning hough not within the words, of the legislator; and others. which may fall within the letter; may be contrary to his meaning, though not expressly excepted. These cases, thus out of he letter are often said to be within the equity, of an act of urliament; and fo, cases within the letter are frequently out fthe equity. Here by equity we mean nothing but the found interpretation of the law; though the words of the law itfelf may be too general, too fpecial, or otherwise inaccurate or kfective. These then are the cases which, as Grotius (t) says "lex non exacte definit, sed arbitrio boni viri permittit;" in wder to find out the true sense and meaning of the lawgiver. from every other topic of construction. But there is not a sinderule of interpreting laws, whether equitably or strictly, that snot equally used by the judges in the courts both of law and quity: the construction must in both be the same; or, if bey differ, it is only as one court of law may also happen to Effer from another. Each endeavours to fix and adopt the me sense of the law in question; neither can enlarge, dimiinh, or alter, that fense if a fingle tittle.

3. AGAIN, it hath been said (u), that fraud, accident, and trust, are the proper and peculiar objects of a court of equity. But every kind of fraud is equally cognizable, and equally adteted to, in a court of law: and some frauds are only cognizable there, as fraud in obtaining a devise of lands, which is always sent out of the equity courts to be there determined. Many accidents are also supplied in a court of law; as, loss of deeds, mistakes in receipts or accounts, wrong payments, deaths which make it impossible to perform a condition literally and a multitude of other contingencies: and many cannot be relieved even in a court of equity; as, if by accident arecovery is ill suffered, a devise ill executed, a contingent mainder destroyed, or a power of leasing omitted in a family settlement. A technical trust indeed, created by the limitation

⁽t) De aequietate. §. 3. (n) 1 Roll. Abr. 374. 4 Inst. 84. 10 Mod. 1.

mitation of a second use, was forced into the courts of equity, in the manner formerly mentioned (w): and this species of trusts, extended by inference and construction, have ever since remained as a kind of peculium in those courts. But there are other trusts, which are cognizable in a court of law: as deposits, and all manner of bailments; and especially that implied contract, so highly beneficial and useful, of having undertaken to account for money received to another's use (x), which is the ground of an action on the case almost as universally remedial as a bill in equity.

4. ONCE more; it has been faid that a court of equity is not bound by rules or precedents, but acts from the opinion of the judge (y) founded on the circumstances of every particular case. Whereas the system of our courts of equity is a laboured connected fystem, governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection. Thus, the refusing a wife her dower in a trust-estate (z), yet allowing the husband his curtefy: the holding the penalty of a bond to be merely a fecurity for the debt and intereft, yet confidering it sometimes as the debt itself, so that the interest shall not exceed that penalty (a): the distinguishing between a mortgage at five per cent. with a clause or reduction to four, if the interest be regularly paid, and a mortgage at four per cent. with a clause of enlargement to five, if the payment of the interest be deferred; so that the former shall be deemed a conscientious, the latter an unrighteous, bargain (b): all these, and other cases that might be instanced, are plainly rules of positive law; supported only by the reverence that is shewn,

(2) 2 P. Wms. 640. See Vol. II. pag. 337. (a) Salk. 154. (b) 2. Vern. 289. 316. 3 Atk. 520.

⁽w) Book II. ch. 20. (x) See pag. 162. (y) This is stated by Mr. Selden (Table talk. tit. equity) with more pleasantry than truth. For law, we have a measure, and know what to trust to: equity is according to the conscience of him that is chancellor; and, as that is larger or narrower, so is equity. Tis all one, as if they should make the standard of the measure a chancellor's foot. What an uncertain measure would this be? One chancelsolution to the same thing with the chancellor's conscience."

III.

ity,

of

nce

are

po-

pliler-

ich

lly

v is

of

lar

ur-

ind

gh

ec-

ate

pe-

te-

he

ng

on

at

y-

be

):

ly

is

n,

ed an

0:

r;

25

r's

1-

nt

4.

flewn, and generally very properly shewn, to a series of former determinations; that the rule of property may be uniform and steady. Nay, sometimes a precedent is so strictly followed, that a particular judgment, sounded upon special circumstances (c), gives rise to a general rule.

In short, if a court of equity in England did really act, as a very ingenious writer in the other part of the island suppofes it (from theory) to do, it would rife above all law, either common or statute, and be a most arbitrary legislator in every particular case. No wonder he is so often mistaken. Grotius, or Puffendorf, or any other of the great mafters of jurisprudence, would have been as little able to discover, by their own light, the fystem of a court of equity in England, as the system tem of a court of law. Especially, as the notions before-mentioned, of the character, power, and practice of a court of equity, were formerly adopted and propagated (though not with approbation of the thing by our principal antiquarians and lawyers; Spelman (d), Coke (e), Lambard (f), and Selden (g), and even the great Bacon (h) himself. But this was in the infancy of our courts of equity, before their jurisdiction was fettled, and when the chancellors themselves, partly from their ignorance of law (being frequently bishops or statesmen) partly from ambition and luft of power (encouraged by the arbitrary principles of the age they lived in) but principally from the narrow and unjust decisions of the courts of law, had arrogated to themselves such unlimited authority, as hath totally been disclaimed by their successors for now above a century past. The decrees of a court of equity were then rather in the nature of awards, formed on the fudden pro re nata, with more probity of intention than knowlege of the subject; founded VOL. III.

⁽c) See the case of Foster and Munt, 1 Vern. 473. with regard to the undisposed residuum of personal estates.

(d) Quae in summis tribunalibus multie legum canone decernunt judices, solus (si restategerit) cohibet cancellarius ex arbitrio: nec alitur decretis tenetur suae curiae vel sui ipsius, quin, elucente nova ratione, recognessat quae voluerit, mutet et del at prout suae videbitur prudentiae.

(Gloss. 108.)

(e) See pag. 53, 54.

(f) Archeion. 71, 72, 73.

(g) Ubi supra.

(h) De Augm. Scient, l. 8. c. 3.

21

li

a

t

1

t

on no fettled principles, as being never defigned, and therefore never used for precedents. But the systems of jurisprudence, in our courts both of law and equity, are now equally artificial systems, founded in the same principles of justice and positive law; but varied by different usages in the forms and mode of their proceedings: the one being originally derived (though much reformed and improved) from the feodal customs, as they prevailed in different ages in the Saxon and Norman judicatures; the other (but with equal improvements) from the imperial and pontifical formularies introduced by their clerical chancellors.

THE fuggestion indeed of every bill, to give jurisdiction to the courts of equity, (copied from those early times) is, that the complainant hath no remedy at the common law. But he, who should from thence conclude, that no case is judged of in equity where there might have been relief at law, and at the fame time casts his eye on the extent and variety of the cases in our equity-reports, must think the law a dead letter indeed. The rules of property, rules of evidence, and rules of interpretation, in both courts are, or should be, exactly the fame: both ought to adopt the best, or must cease to be courts of justice. Formerly some causes, which now no longer exist, might occasion a different rule to be followed in one court, from what was afterwards adopted in the other, as founded in the nature and reason of the thing: but the instant those causes ceased, the measure of substantial justice ought to have been the same in both. Thus the penalty of a bond, originally contrived to evade the abfurdity of those monkish constitutions, which prohibited taking interest for money, was therefore very pardonably confidered as the real debt in the courts of law, when the debtor neglected to perform his agreement for the return of the loan with interest: for the judges could not, as the law then stood, give judgment that the interest should be specifically paid. But when afterwards the taking of interest became legal, as the necessary companion of commerce (i), nay after the statute of 37 H. VIII. c. 9. had declared

⁽i) See Vol. II. pag. 456.

I.

e-

uly

ad

ad

ed

f-

nd s)

y

to

at

ut ed

d

ne

er es

ne be

in

18

nt

to

ı,

h

as

ne

es

:-

ie

of

d

declared the debt or loan itself to be "the just and true intent" for which the obligation was given, their narrow minded fucceffors still adhered wilfully and technically to the letter of the antient precedents, and refused to consider the payment of principal, interest, and costs, as a full satisfaction of the bond. At the same time more liberal men, who sate in the courts of equity, construed the instrument according to its " just and " true intent," as merely a fecurity for the loan: in which light it was certainly understood by the parties, at least after these determinations; and therefore this construction should have been univerfally received. So in mortgages, being only a landed as the other is a personal fecurity for the money lent, the payment of principal, interest, and costs ought at any time, before judgment executed, to have faved the forfeiture in a court of law, as well as in a court of equity. And the inconvenience as well as injustice, of putting different constructions in different courts upon one and the same transaction, obliged the parliament at length to interfere, and to direct by the statutes 4 & 5 Ann. c. 16. and 7 Geo. II. c. 20. that, in the cases of bonds and mortgages, what had long been the practice of the courts of equity should also for the future be followed in the courts ot law.

AGAIN; neither a court of equity nor of law can vary men's wills or agreements, or (in other words) make wills or agreements for them. Both are to understand them truly, and therefore both of them uniformly. One court ought not to extend, nor the other abridge, a lawful provision deliberately fettled by the parties, contrary to its just intent. A court of equity, no more than a court of law, can relieve against a penalty in the nature of stated damages; as a rent of 51. an acre for ploughing up antient meadow (k): nor against a lapse of time where the time is material to the contract; as in covenants for renewal of leafes. Both courts will equitably construe, but neither pretends to control or change, a lawful stipulation or engagement. T 2

THE

fa

0

CC

20

CC

q

th

to

in

ar

be

an

YP

OV

kn

C

THE rules of decision are in both courts equally opposite to the subjects of which they take cognizance. Where the subject-matter is fuch as requires to be determined fecundum aequum et bonum, as generally upon actions on the case, the judgments of the courts of law are guided by the most liberal equity. In matters of politive right, both courts must submit to and follow those antient and invariable maxims " quae re-" licta sunt et tradita (1)." Both follow the law of nations, and collect it from history and the most approved authors of all countries, where the question is the object of that law: as in case of the privileges of embassadors (m), hostages, or ranfom bills (n). In mercantile transactions they follow the marine law (o), and argue from the usages and authorities received in all maritime countries. Where they exercise a concurrent jurisdiction, they both follow the law of the proper forum (p): in matters originally of ecclefiaftical cognizance. they both equally adopt the canon or imperial law, according to the nature of the subject (q); and, if a question came before either, which was properly the object of a foreign municipal law, they would both receive information what is the rule of the country (r), and would both decide accordingly.

Such then being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their effential difference consist? It principally consists in the different modes of administring justice in each; in the mode of proof, the mode of trial, and the mode of relief. Upon these, and upon two other accidental grounds of jurisdiction, which were formerly driven into those courts by narrow decisions of the courts of law, viz. the true construction of securities for money

⁽¹⁾ De jure naturae cogitare per nos atque dicere debemus; de jure populi Romani, quae relicta funt et tradita. (Cic. de leg. l. 3. ad ealc.) (m) 8ee Vol. I. pag. 253. (n) Ricord. v. Bettenham. Tr. 5 Geo. III. B. R. (o) Sce Vol. I. pag. 75. Vol. II. pag. 459. 461. 467. (p) See Vol. II. pag. 513. (q) Ibid. 504. (r) Ibid. 463.

İ.

to

m

ne al

it

8-

s, of

as

1-

a-

e-

n-

er

e,

d-

ne

1-

he

y.

ns

eir

e-

of

fe,

of

for

ey

de 3.

75.

(q)

money lent, and the form and effect of a trust or second use; upon these main pillars hath been gradually erected that structure of jurisprudence which prevails in our courts of equity, and is inwardly bottomed upon the same substantial foundations as the legal system which hath hitherto been delineated in these commentaries; however different they may appear in their outward form, from the different taste of their architects.

1. AND, first, as to the mode of proof. When facts, or their leading circumstances, rest only in the knowlege of the party, a court of equity applies itself to his conscience, and purges him upon oath with regard to the truth of the transaction; and that, being once discovered, the judgment is the fame in equity as it would have been at law. But, for want of this discovery at law, the courts of equity have acquired a concurrent jurisdiction with every other court in all matters of account (s. As incident to accounts, they take a concurrent ognizance of the administration of personal assets (t), consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators (u). As incident to accounts, they also take the concurrent jurisdiction of tithes, and all questions relating thereto (w); of all dealings in partnership (x), and many other mercantile transactions; and so of bailiffs, receivers, factors, and agents (y). It would be endless to point out all the several avenues in human affairs, and in this commercial age, which lead to or end in accounts.

FROM the fame fruitful fource, the compulsive discovery upon oath, the courts of equity have acquired a jurisdiction over almost all matters of fraud (z); all matters in the private knowlege of the party, which, though concealed, are binding in conscience; and all judgments at law, obtained through T 3

⁽s) t Chan. Caf. 57. (t) 2 P. Wms. 145. (u) 2 Chan. Caf. 152. (w) 1 Equ. Caf. abr. 367. (x) 2 Vern 277. (y) Ibid. 638. (z) 2 Chan. Caf. 46.

tio

ons

cur

hut

fra

an

thu

ple

it t

oth

he

fta

fu

uf

tio

fec

al

W

po

tu

fe

T

2

such fraud or concealment. And this, not by impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking any advantage of a judgment, obtained by suppressing the truth (a); and which, had the same facts appeared on the trial, as are now discovered, he would never have obtained at ail.

- 2. As to the mode of trial. This is by interrogatories administred to the witnesses, upon which their depositions are taken in writing, wherever they happen to reside. If therefore the cause arises in a foreign country, and the witnesses reside upon the spot; if, in causes arising in England, the witnesses are abroad, or shortly to leave the kingdom; or if witnesses residing at home are aged or infirm; any of these cases lays a ground for a court of equity to grant a commission to examine them, and (in consequence) to exercise the same jurisdiction, which might have been exercised at law, if the witnesses could probably attend.
- 3. WITH respect to the mode of relief. The want of a more specific remedy, than can be obtained in the courts of law, gives a concurrent jurisdiction to a court of equity in a great variety of cases. To instance in executory agreements. A court of equity will compel them to be carried into thick execution (b), unless where it is improper or impossible; inflead of giving damages for their non-performance. And hence a fiction is established, that what ought to be done, shall be considered as being actually done (c) and shall relate back to the time when it ought to have been done originally: and this fiction is so closely pursued through all its consequences, that it necessarily branches out into many rules of jurifprudence, which form a certain regular system. So, of waste, and other similar injuries, a court of equity takes a concurrent cognizance, in order to prevent them by injunction (d). Over questions that may be tried at law, in a great multiplicity of actions, a court of equity assumes a jurisdic-

⁽a) 3 P. Wms. 148. Yearbook, 22 Edw. IV. 37. pl. 21. (b) Equ. Caf. abr. 16. (c) 3 P. Wms. 215. (d) 1 Ch. Rep. 14. 2 Chan. Caf. 32.

sion, to prevent the expense and vexation of endless litigations and suits (e). Invarious kinds of frauds it assumes a concurrent (f) jurisdiction, not only for the sake of a discovery, but a more extensive and specific relief: as by setting aside saudulent deeds (g), decreeing conveyances (h), or directing an absolute conveyance merely to stand as a security (i). And thus, lastly, for the sake of a more beneficial and complete relief by decreeing a sale of lands (k), a court of equity holds plea of all debts, incumbrances, and charges, that may affect it or issue thereout.

- 4. The true construction of fecurities for money lent is another fountain of jurisdiction in courts of equity. When they held the penalty of the bond to be the form, and that in substance it was only as a pledge to secure the repayment of the sum bona side advanced, with a proper compensation for the use, they laid the foundation of a regular series of determinations, which have settled the doctrine of personal pledges or securities, and are equally applicable to mortgages of real property. The mortgagor continues owner of the land, the mortgagee of the money lent upon it: but this ownership is mutually transferred, and the mortgagor is barred from redemption if, when called upon by the mortgagee, he does not redeem within a time limited by the court; or he may when out of possessing the same of limitations.
- 5. The form of a trust, or second use, gives the court of equity an exclusive jurisdiction as to the subject-matter of all settlements and devises in that form, and of all the long terms created in the present complicated mode of conveyancing. This is a very ample source of jurisdiction: but the trust is governed by very nearly the same rules, as would govern the estate in a court of law (1), if no trustee was interposed, and,

⁽e) 1 Vern. 308 Prec. Chan. 261. 1 P. Wms. 672. Stra. 404. (f) 2 P. Wms. 156. (g) 1 Vern. 32. 1 P. Wms. 239. (h) 1 Vern. 237. (i) 2 Vern. 84. (k) 1 Equ. Cal. abr. 337. (l) 2 P. Wms. 645. 668, 669.

by a regular positive system established in the courts of equity the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the courts of the common law.

THESE are the principal (for I omit the minuter) grounds of the jurisdiction at present exercised in our courts of equity; which differ, we fee, very confiderably from the notions entertained by strangers, and even by those courts themselves before they arrived to maturity; as appears from the principles laid down, and the jealousies entertained of their abuse, by our early juridical writers cited in a former (m) page: and which have been implicitly received and handed down by fubsequent compilers, without attending to those gradual accessions and derelictions, by which in the course of a century this mighty river hath imperceptibly shifted its channel. Lambard in particular in the reign of queen Elizabeth, lays it down (n), that "equity should not be appealed unto, but only in rare and extraor-"dinary matters: and that a good chancellor will not arrogate "authority in every complaint that shall be brought before him, " upon whatfoever fuggestion; and thereby both overthrow the " authority of the courts of common law, and bring upon men " fuch a confusion and uncertainty, as hardly any man should know how or how long to hold his own affured to him." And certainly, if a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to prefide might entertain of conscience in every particular case, the inconvenience that would arise from this uncertainty, would be a worfe evil than any hardship that could follow from rules too ftrict and inflexible. Its powers would have become too arbitrary to have been endured in a country like this (o), which boafts of being governed in all respects by law and not by will, But fince the time when Lambard wrote a fet of great and eminent lawyers (p), who have successively held the great feal, have by degrees erected the system of relief administred by a court of equity into a regular science, which

(m) See pag. 433. (n) Archeien. 71.73. (o) 2 P. Wms. 685, 686. (p) See pag. 53, 54, 55.

f

which cannot be attained without study and experience, any more than the science of law: but from which, when understood, it may be known what remedy a suitor is entitled to expect, and by what mode of suit, as readily and with as much precision, in a court of equity as in a court of law.

IT were much to be wished, for the sake of certainty, peace, and justice, that each court would as far as possible follow the other, in the best and most effectual rules for attaining those defirable ends. It is a maxim, that equity follows the law; and in former days the law has not scrupled to follow even that equity, which was laid down by the clerical chancellors. Every one, who is conversant in our antient books, knows that many valuable improvements in the state of our tenures (especially in leaseholds (q) and copyholds) (r) and the forms of administring justice (f), have arisen from this single reafon, that the same thing was constantly effected by means of a subpoena in the chancery. And sure there cannot be a greater folecism, than that in two sovereign independent courts, established in the same country, exercising concurrent jurisdiction, and over the same subject-matter, there should exist in a single instance two different rules of property, clashing with or contradicting each other.

It would carry me beyond the bounds of my present purpose, to go farther into this matter. I have been tempted to go so far, because the very learned author to whom I have alluded, and whose works have given exquisite pleasure to every contemplative lawyer, is (among many others) a strong proof how easily names, and loose or unguarded expressions to be met with in the best of our writers, are apt to confound a stranger; and to give him erroneous ideas of separate jurisdictions now existing in England, which never were separated in any other country in the universe. It hath also afforded me an opportunity to vindicate, on the one hand, the justice of our courts of law from being

⁽q) Gilbert of ejectm. 2. 2 Bac. Abr. 160. (f) Bro. Abr. 1. lenant per copie. 10Litt. § 77. (f) See pag. 200.

that harsh and illiberal rule, which many are too ready to suppose it; and, on the other, the justice of our courts of equity from being the result of mere arbitrary opinion, or an exercise of dictatorial power, which rides over the law of the land, and corrects, amends, and controlls it by the loose and fluctuating dictates of the conscience of a single judge. It is now high time to proceed to the practice of our courts of equity, thus explained and thus understood.

THE first commencement of a suit in chancery is by preferring a bill to the lord chancellor in the style of a petition; " humbly complaining sheweth to your lordship your orator "A. B. that, &c." This is in the nature of a declaration at common law, or a libel and allegation in the spiritual courts: fetting forth the circumstances of the case at length, as some fraud, truft, or hardship; "in tender consideration whereof," (which is the usual language of the bill " and for that your " orator is wholly without remedy at the common law," relief is therefore prayed at the chancellor's hands, and also process of subpoena against the defendant, to compel him to answer upon oath to all the matter charged in the bill. And, if it be to quiet the possession of lands, to stay waste, or to stop proceedings at law, an injunction is also prayed in the nature of the interdictum of the civil law, commanding the defendant to cease.

This bill must call all necessary parties, however remotely concerned in interest, before the court; otherwise no decree can be made to bind them: and must be signed by counsel, as a certificate of its decency and propriety. For it must not contain matter either scandalous or impertinent: if it does, the desendant may refuse to answer it, till such scandal or impertinence is expunged, which is done upon an order to refer it to one of the officers of the court, called a master in chancery; of whom there are in number twelve, including the master of the rolls, all of whom, so late as the reign of queen Elizabeth, were commonly doctors

doctors of the civil law (s). The master is to examine the propriety of the bill: and, if he reports it scandalous or impertinent, such matter must be struck out, and the defendant shall have his costs; which ought of right to be paid by the counsel who signed the bill.

WHEN the bill is filed in the office of the fix clerks, (who originally were all in orders; and therefore, when the conftitution of the court began to alter, a law (t) was made to permit them to marry) when, I fay, the bill is thus filed, if an injunction be prayed therein, it may be had at various stages of the cause, according to the circumstances of the case. If the bill be to ftay execution upon any oppressive judgment, and the defendant does not put in his answer within the stated time allowed by the rules of the court, an injunction will iffue of course: and, when the answer comes in, the injunction can only be continued upon a fufficient ground appearing from the answer itself. But if an injunction be wanted to stay waste, or other injuries of an equally urgent nature, then upon the filing of the bill, and a proper case supported by affidavits, the court will grant an injunction immediately to continue till the defendant has put in his answer, and till the court shall make some farther order concerning it: and, when the answer comes in, whether it shall then be dissolved or continued till the hearing of the cause, is determined by the court upon argument, drawn from confidering the answer and affidavit together.

But, upon common bills; as foon as they are filed, process of fubpoena is taken out; which is a writ commanding the defendant to appear and answer to the bill, on pain of 100 l. But this is not all: for, if the defendant, on service of the fubpoena, does not appear within the time limited by the rules of the court, and plead, demur, or answer to the bill, he is then said to be in contempt; and the respective processes of contempt are in successive order awarded against him. The first of which is an attachment,

⁽s) Smith's commonw. b. 2. c. 12. Hen. VIII. c. 8.

⁽t) Stat. 14 & 15

tachment, which is a writ in the nature of a capias, directed to the sheriff, and commanding him to attach, or take up. the defendant, and bring him into court. If the fheriff returns that the defendant non est inventus, then an attachment with proclamations iffues; which, befides the ordinary form of attachment, directs the sheriff that he cause public proclamations to be made, throughout the county, to fummon the defendant, upon his allegiance, personally to appear and anfwer. If this be also returned with a non eff inventus, and he fill stands out in contempt, a commission of rebellion is awarded against him, for not obeying the proclamations according to his allegiance; and four commissioners therein named, or any of them, are ordered to attach him wherefoever he may be found in Great Britain, as a rebel and contemner of the king's laws and government, by refufing to attend his fovereign when thereunto required: fince, as was before observed (u), matters of equity were originally determined by the king in person, assisted by his council; though that business is now devolved upon his chancellor. If upon this commiffrom of rebellion a non est inventus is returned, the court then fends a serjeant at arms in quest of him; and, if he eludes the fearch of the ferjeant also, then a sequestration issues to feife all his personal estate, and the profits of his real, and to detain them, subject to the order of the court. - Sequestrations were first introduced by fir Nicholas Bacon, lord keeper in the reign of queen Elizabeth; before which the court found fome difficulty in enforcing its process and decrees (w). After an order for a sequestration issued, the plaintiff's bill is to be taken pro confesso, and a decree to be made accordingly. So that the sequestration does not seem to be in the nature of process to bring in the defendant, but only intended to enforce the performance of the decree. Thus much if the defendant absconds.

If the defendant is taken upon any of this process, he is to be committed to the fleet, or other prison, till he puts in his appearance, or answer, or performs whatever else this process is issued iffued to enforce, and also clears his contempts by paying the costs which the plaintiff has incurred thereby. For the same kind of process is issued out in all sorts of contempts during the progress of the cause, if the parties in any point refuse or neglect to obey the order of the court.

THE process against a body corporate is by distringus, to distrein them by their goods and chattels, rents and profits, till they shall obey the summons or directions of the court. And, if a peer is a defendant, the lord chancellor sends a letter missive to him to request his appearance, together with a copy of the bill; and, if he neglects to appear, then he may be served with a subpoena; and, if he continues still in contempt, a sequestration issues out immediately against his lands and goods, without any of the mesne process of attachments, &c. which are directed only against the person, and therefore cannot affect a lord of parliament. The same process issues against a member of the house of commons, except only that the lord chancellor sends him no letter missive.

THE ordinary process before mentioned cannot be sued out, till after service of the subpoena, for then the contempt begins; otherwise he is not presumed to have notice of the bill: and therefore, by absconding to avoid the subpoena, a defendant might have eluded justice, till the statute 5 Geo. II. c. 25. which enacts that, where the defendant cannot be found to be served with process of subpoena, and absconds (as is believed) to avoid being served therewith, a day shall be appointed him to appear to the bill of the plaintist; which is to be inserted in the London Gazette, read in the parish church where the defendant last lived, and fixed up at the Royal Exchange: and if the defendant doth not appear upon that day, the bill shall be taken pro confesso.

But if the defendant appears regularly, and takes a copy of the bill, he is next to demur, plead, or answer.

A DE-

A DEMURRER in equity is nearly of the same nature as a demurrer in law; being an appeal to the judgment of the court, whether the defendant shall be bound to answer the plaintiff's bill: as, for want of sufficient matter of equity therein contained; or where the plaintiff, upon his own shewing, appears to have no right; or where the bill seeks a discovery of a thing which may cause a forfeiture of any kind, or may convict a man of any criminal mis-behaviour. For any of these causes a defendant may demur to the bill. And if, on the demurrer, the defendant prevails, the plaintiff's bill shall be dismissed: if the demurrer be over-ruled, the defendant is ordered to answer.

A PLEA may be either to the jurisdiction; shewing that the court has no cognizance of the cause: or to the person; shewing some disability in the plaintiff, as by outlawry, excommunication, and the like: or it is in bar; shewing some matter wherefore the plaintiff can demand no relief, as an act of parliament, a fine, a release, or a former decree. And the truth of this plea the defendant is bound to prove, if put upon it by the plaintiff. But as bills are often of a complicated nature, and contain various matter, a man may plead as to part, demur as to part, and answer to the residue. But no exceptions to formal minutiae in the pleadings will be here allowed; for the parties are at liberty, on the discovery of any errors in form, to amend them (x).

An answer is the most usual defence that is made to a plaintiff's bill. It is given in upon oath, or the honour of a peer or peeres; but, where there are amicable defendants, their answer is usually taken without oath by consent of the plaintiff. This method of proceeding is taken from the ecclesiastical courts, like the rest of the practice in chancery: for there, in almost every case, the plaintiff may demand the oath of his adversary in supply of proof.

⁽x) En cest court de chauncerie, home ne serra prejudice par son myspledying cu pur defaut de forma, mes solonque le veryte del mater: car il doit agarder solonque consciens, et nemi ex rigore juris. (Dyversite des courts, edit. 1535 fol. 296, 297. Bro. Abr. t. jurisdiction, 50.)

Formerly this was done in those courts with compurgators. in the manner of our waging of law: but this has been long difused; and instead of it the present kind of purgation, by the fingle oath of the party himself, was introduced. This oath was made use of in the spiritual courts, as well in criminal cases of ecclesiastical cognizance, as in matters of civil right: and it was then usually denominated the oath ex officio, whereof the high commission court in particular made a most extravagant and illegal use; forming a court of inquisition, in which all persons were obliged to answer, in cases of bare fuspicion, if the commissioners thought proper to proceed against them ex officio for any supposed ecclesiastical enormities. But when the high commission court was abolished by statute 16 Car. I. c. 11. this oath ex officio was abolished with it: and it is also enacted by statute 13 Car. II. st. 1. c. 12. " that it " shall not be lawful for any bishop or ecclesiastical judge to " tender to any person the oath ex officio, or any other oath-"whereby the party may be charged or compelled to confess, "accuse or purge himself of any criminal matter." But this does not extend to oaths in a civil fuit, and therefore it is fill the practice both in the spiritual courts, and in equity, to demand the personal answer of the party himself upon oath. Yet if in the bill any question be put, that tends to the discovery of any crime, the defendant may thereupon demur, as was before observed, and may refuse to answer.

If the defendant lives within twenty miles of London, he must be sworn before one of the masters of the court: if farther off, there may be a dedimus potestatem or commission to take his answer in the country, where the commissioners administer him the usual oath; and then, the answer being sealed up, either one of the commissioners carries it up to the court; or it is sent by a messenger, who swears he received it from one of the commissioners, and that the same has not been opened or altered since he received it. An answer must be signed by counsel, and must either deny or confess all the material parts of the bill;

or it may confess and avoid, that is, justify or palliate the facts. If one of these is not done, the answer may be excepted to for insufficiency, and the defendant be compelled to put in a more sufficient answer. A defendant cannot pray any thing in this his answer, but to be dismissed the court: if he has any relief to pray against the plaintist, he must do it by an original bill of his own, which is called a cross bill.

AFTER answer put in, the plaintiff, upon payment of costs, may amend his bill, either by adding new parties, or new matter, or both, upon the new lights given him by the defendant; and the defendant is obliged to answer asresh to such amended bill. But this must be before the plaintiff has replied to the defendant's answer, whereby the cause is at iffue; for afterwards, if new matter arises, which did not exist before, he must set it forth by a supplemental bill. There may be also a bill of revivor, when the suit is abated by the death of any of the parties; in order to fet the proceedings again in motion, without which they remain at a stand. And there is likewise a bill of interpleader; where a person who owes a debt or rent to one of the parties in fuit, but, till the determination of it, he knows not to which, defires that they may interplead, that he may be fafe in the payment. In this last case it is usual to order the money to be paid into court, for the benefit of fuch of the parties, to whom upon hearing the court shall decree it to be due. But this depends upon circumstances: and the plaintiff must also annex an affidavit to his bill, fwearing that he does not collude with either of the parties.

If the plaintiff finds fufficient matter confessed in the defendant's answer to ground a decree upon, he may proceed to the hearing of the cause upon bill and answer only. But in that case he must take the defendant's answer to be true in every point. Otherwise the course is for the plaintiff to reply generally to the answer, avering his bill to be true, certain, and sufficient, and the defendant's answer to be directly the reverse; which he

is ready to prove as the court shall award: upon which the defendant rejoins, averring the like on his side; which is joining issue upon the facts in dispute. To prove which sacts is the next concern.

THIS is done by examination of witnesses, and taking their depositions in writing, according to the manner of the civil law. And for that purpose interrogatories are framed, or questions in writing; which, and which only, are to be proposed to, and asked of, the witnesses in the cause. These interrogatories must be short and pertinent not leading ones: (as " did not you see this, or, did not you hear that ?") for if they be fuch, the depositions taken thereon will be suppressed and not suffered to be read. For the purpose of examining witnesses in or near London, there is an examiner's office appointed; but, for evidence who live in the country, a commission to examine witnesses is usually granted to four commissioners, two named of each side, or any three or two of them, to take the depositions there. And if the witnesses refide beyond fea, a commission may be had to examine them there upon their own oaths, and (if foreigners) upon the oaths of skilful interpreters. And it hath been held (y) that the deposition of an heathen who believes in the supreme being, taken by commission in the most solemn manner according to the custom of his own country, may be read in evidence.

THE commissioners are sworn to take the examinations truly and without partiality, and not to divulge them till published in the court of chancery; and their clerks are also sworn to secrecy. The witnesses are compellable by process of subpoena, as in the courts of common law, to appear and submit to examination. And when their depositions are taken, they are transmitted to the court with the same care that the answer of a defendant is sent.

IF

IF witnesses to a disputable fact are old and infirm, it is very usual to file a bill to perpetuate the testimony of those witnesses, although no suit is depending; for, it may be. a man's antagonist only waits for the death of some of them to begin his fuit. This is most frequent when lands are devised by will away from the heir at law; and the devifee, in order to perpetuate the testimony of the witnesses to such will. exhibits a bill in chancery against the heir, and sets forth the will verbation therein, fuggesting that the heir is inclined to dispute its validity: and then, the defendant having answered, they proceed to iffue, as in other cases, and examine the witnesses to the will; after which the cause is at an end, without proceeding to any decree, no relief being prayed by the bill: but the heir is entitled to his costs, even though he contests the will. This is what is usually meant by proving a will in chancery.

WHEN all the witnesses are examined, then, and not before, the depositions may be published, by a rule to pass publication; after which they are open for the inspection of all the parties, and copies may be taken of them. The cause is then ripe to be fet down for hearing, which may be done at the procurement of the plaintiff, or defendant, before either the lord chancellor or the master of the rolls, according to the discretion of the clerk in court, regulated by the nature and importance of the fuit, and the arrear of causes depending before each of them respectively. Concerning the authority of the master of the rolls to hear and determine causes, and his general power in the court of chancery, there were (not many years fince) divers questions and disputes very warmly agitated; to quiet which it was declared by ftatute 3 Geo. II. c. 30. that all orders and decrees by him made, except fuch as by the course of the court were appropriated to the great feal alone, should be deemed to be valid; subject nevertheless to be discharged or altered by the lord chancellor, and fo as they shall not be enrolled, all the same are figned by his lordship. Either party may be subpoena'd to hear judgment

ment on the day so fixed for the hearing: and then, if the plaintiff does not attend, his bill is dismissed with costs; or, if the defendant makes default, a decree will be made against him, which will be final, unless he pays the plaintiff's costs of attendance, and shews good cause to the contrary on a day appointed by the court. A plaintiff's bill may also at any time be dismissed for want of prosecution, which is in the nature of a nonsuit at law, if he suffers three terms to elapse without moving forward in the cause.

WHEN there are cross causes, on a cross bill filed by the defendant against the plaintiff in the original cause, they are generally contrived to be brought on together, that the same hearing and the same decree may serve for both of them. The method of hearing causes in court is usually this. The parties on both fides appearing by their counsel, the plaintiff's bill is first opened, or briefly abridged, and the defendant's answer also, by the junior counsel on each side : after which the plaintiff's leading counsel states the case and the matters in iffue, and the points of equity arifing therefrom: and then such depositions as are called for by the plaintiff are read by one of the fix clerks, and the plaintiff may also read such part of the defendant's answer, as he thinks material or convenient (z): and after this the rest of the counsel for the plaintiff make their observations and arguments. Then the defendant's counsel go through the same process for him, except that they may not read any part of his answer; and the counfel for the plaintiff are heard in reply. When all are heard, the court pronounces the decree, adjusting every point in debate according to equity and good conscience; which decree being usually very long, the minutes of it are taken down, and read openly in court by the registrar. The matter of costs to be given to either party, is not here held to be a point of right, but merely discretionary (by the statute 17 Ric. II. c. 6). according to the circumstances of the case, as they appear

⁽²⁾ On a trial at law if the plaintiff reads any part of the defendant's answer, he must read the whole of it; for by reading any of it he shews a reliance on the truth of the desendant's testimony, and make the whole of his answer evidence.

more or less favourable to the party vanquished. And yet the statute 15 Hen. VI. c. 4. seems expressly to direct, that as well damages as costs shall be given to the defendant, if wrongfully vexed in this court.

THE chancelfor's decree is either interlocutory or final. It very feldom happens that the first decree can be final, or conclude the cause; for, if any matter of fact is strongly controverted, this court is fo fensible of the deficiency of trial by written depositions, that it will not bind the parties thereby, but usually directs the matter to be tried by jury; especially fuch important facts as the validity of a will, or whether A is the heir at law to B, or the existence of a modus decimandi or real and immemorial composition for tithes. But, as no jury can be summoned to attend at this court, the fact is usually directed to be tried at the bar of the court of king's bench or at the affises, upon a feigned iffue. For, (in order to bring it there, and have the point in dispute, and that only, put in issue) an action is feigned to be brought, wherein the pretended plaintiff declares, that he laid a wager of 5 l. with the defendant, that A was heir at law to B; and then avers that he is so; and brings his action for the 51. The defendant allows the wager, but avers that A is not the heir to B; and thereupon that iffue is joined, which is directed out of chancery to be tried: and thus the verdict of the jurors at law determines the fact in the court of equity. These feigned issues seem borrowed from the sponsio judicialis of the Romans (a): and are also frequently used in the courts of law, by confent of the parties, to determine some disputed right without the formality of pleading, and thereby to fave much time and expense in the decision of a cause.

So likewise, if a question of mere law arises in the course of a cause, as whether by the words of a will an estate for life or in

⁽a) Nota est sponsio judicialis: " spondesne quingentos, si meus sit? spondeo, si tuus sit. Et tu quoque spondesne quingentos, ni tuus sit? spondeo, ni meus sit? Vide Heinecc. Antiquitat. l. 3. t. 16 §. 3. S. Sigon. de judiciis l. 21, p. 466. citat. ibid.

in tail is created, or whether a future interest devised by a testator shall operate as a remainder or an executory devise, it is the practice of this court to refer it to the opinion of the judges of the court of king's bench, upon a case stated for that purpose; wherein all the material facts are admitted, and the point of law is submitted to their decision: who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion to the chancellor. And upon such certificate the decree is usually sounded.

ANOTHER thing also retards the completion of decrees. Frequently long accounts are to be settled, incumbrances and debts to be enquired into, and an hundred little facts to be cleared up, before a decree can do full and sufficient justice. These matters are always by the decree on the first hearing referred to a master in chancery to examine; which examinations frequently last for years; and then he is to report the fact, as it appears to him, to the court. This report may be excepted to, disproved, and over-ruled; or otherwise is consistency, and made absolute, by order of the court.

When all issues are tried and settled, and all references to the master ended, the cause is again brought to hearing upon the matters of equity reserved; and a final decree is made: the performance of which is inforced (if necessary) by commitment of the person or sequestration of the party's estate. And if by this decree either party thinks himself aggrieved, he may petition the chancellor for a rehearing; whether it was heard before his lordship, or any of the judges, sitting for him, or before the master of the rolls. For whoever may have heard the cause, it is the chancellor's decree, and must be signed by him before it is enrolled (b); which is done of course unless a rehearing be desired. Every petition for a rehearing must be signed by two counsel of character, usually such as have been concerned in the cause, certifying that they apprehend the cause is proper to

⁽b) Stat. 3 Geo. II. c 30. See pag. 450.

be reheard. And upon the rehearing all the evidence taken in the cause, whether read before or not, is now admitted to be read: because it is the decree of the chancellor himself, who only now sits to hear reasons why it should not be enrolled and perfected; at which time all omissions of either evidence or argument may be supplied (c). But after the decree is once signed and enrolled, it cannot be reheard or rectified, but by bill of review, or by appeal to the house of lords.

A BILL of review may be had upon apparent error in judgment, appearing on the face of the decree; or, by special leave of the court, upon oath made of the discovery of new matter or evidence, which could not possibly be had or used at the time when the decree passed. But no new evidence or matter then in the knowlege of the parties, and which might have been used before, shall be a sufficient ground for a bill of review.

An appeal to parliament, that is, to the house of lords, is the dernier refort of the subject who thinks himself aggrieved by any interlocutory order or final determination in this court: and it is effected by petition to the house of peers, and not by writ of error, as upon judgments at common law. This jurisdiction is said (d) to have begun in 18 Jac. I. and certainly the first petition, which appears in the records of parliament, was preferred in that year (e); and the first that was heard and determined (though the name of appeal was then a novelty) was presented in a few months after (f): both levelled against the lord keeper Bacon for corruption, and other misbehaviour. It was afterwards warmly controverted by the house of commons in the reign of Charles the second (g). But this dispute is now at rest (h): it being obvious to the reason of all mankind, that when the courts of equity became principal tribunals for deciding causes of property, a revision of their decrees (by way of appeal) became equally necessary,

⁽c) Gilb. Rep. 151, 152. (d) Com. journ. 13 Mar. 1704. (e) Lord's journ. 23 Mar. 1620. (f) *Ibid.* 3, 11, 12 Dec. 1621. (g) Com. journ. 19 Nov. 1675, &c. (h) Show. Parl. C. 81.

necessary, as a writ of error from the judgment of a court of law. And, upon the same principle, from decrees of the chancellor relating to the commissioners for the dissolution of chauntries, &c. under the statute 37 Hen. VIII. c. 4. (as well as for charitable uses, under statute 43 Eliz. c. 4) an appeal to the king in parliament was always unquestionably allowed (i). But no new evidence is admitted in the house of lords upon any account: this being a distinct jurisdiction (k): which differs it very confiderably from those instances, wherein the fame jurisdiction revises and corrects its own acts, as in rehearings and bills of review. For it is a practice unknown to our law, (though constantly followed in the spiritual courts) when a fuperior court is reviewing the fentence of an inferior, to examine the justice of the former decree by evidence that was never produced below. And thus much for the general method of proceeding in the courts of equity.

t S

1 1 ł 1 e

a

(i) Duke's char. uses. 62. (k) Gilb. Rep. 155, 156.

THE END OF THE THIRD BOOK.



fo ma efq nar vice len shir right

Lor CA fen ten fecci kin the our Ab

APPENDIX.

SOUTH OF THE PROPERTY OF THE PARTY OF THE PA

acros with the last adopted the companies of the commen

on the part of one and took the kine which is a partie of

No. I.

Proceedings on a Writ of RIGHT Patent.

§. 1. Writ of RIGHT patent in the Court Baron.

EORGE the fecond, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and fo forth, to Willoughby earl of Abingdon, greeting. WE command you that without delay you hold full right to William Kent, equire, of one messuage and twenty acres of land with the appurtenances in Dorchester, which he claims to hold of you by the free service of one penny yearly in lieu of all services, of which Richard Allen desorces him. And unless you so do, let the sheriff of Oxford-hire do it, that we no longer hear complaint thereof for defect of right. WITNESS ourself at Westminster, the twentieth day of August, in the thirtieth year of our reign.

Pledges of Prosecution, Sichard Roe.

§. 2. Writ of Tolt, to remove it into the County Count.

CHARLES MORTON, esquire, sheriff of Oxfordshire, to John Long bailiff errant of our lord the king and of myself, greeting. BE-CAUSE by the complaint of William Kent, esquire, personally present at my county-court, to wit, on Monday the fixth day of September in the thirtieth year of the reign of our lord Ge or Ge the second, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and so forth, at Oxford in the shire-house there holden, I am informed, that although he himself the writ of our said lord the king of right patent directed to Willoughby earl of Abingdon, for this that he should hold full right to the said William Vol. III.

Kent of one meffuage and twenty acres of land with the appurtenances in Dorchester within my faid county, of which Richard Allen deforces him, hath brought to the faid Willoughby earl of Abingdon; yet, for that the faid Willoughby earl of Abingdon favoureth the faid Richard Allen in this part, and hath hitherto delayed to do full right according to the exigence of the faid writ, I command you on the part of our faid lord the king, firmly enjoining, that in your proper person you go to the court baron of the said Willoughby earl of Abingdon at Dorchester aforesaid, and take away the plaint, which there is between the faid William Kent and Richard Allen by the faid writ, into my county court to be next holden: and fummon by good fummoners the faid Richard Allen, that he be at my county court on Monday the fourth day of October next coming at Oxford in the shirehouse there to be holden, to answer to the said William Kent thereof. And have you there then the faid plaint, the fummoners, and this precept. GIVEN in my county court at Oxford in the thirehouse, the fixth day of September, in the year aforesaid.

§. 3. Writ of PONE, to remove it into the Court of Common Pleas.

GEORGE the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Oxfordshire, greeting. PUT, at the request of William Kent, before our justices at Westminster on the morrow of All Souls, the plaint which is in your county court by our writ of right, between the said William Kent, demandant, and Richard Allen tenant, of one messuage and twenty acres of land with the appurtenances in Dorchester; and summon by good summoners the said Richard Allen, that he be then there, to answer to the said William Kent thereof. And have you there the summoners and this writ. WITNESS ourself at Westminster, the tenth day of September, in the thirtieth year of our reign.

§. 4. Writ of RIGHT, quia Dominns remisit Curiam.

GEORGE the second, by the grace of God of Great Bitain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Oxfordshire, greeting. COMMAND Richard Allen, that he justly and without delay render unto William Kent one messuage and twenty acres of land with the appurtenances in Dorchester, which he claims to be his right and inheritance, and whereupon he complains that the aforesaid Richard unjustly deforces him. And unless he shall so do, and if the said William shall give you security of prosecuting his claim, then summon by good summoners the said Richard,

y

n

e

n 1

.

d

t

e

e

t

e

d

Richard, that he appear before our justices at Westminster on the morrow of All Souls, to hew wherefore he hath not done it. And have you there the furnmoners and this writ. WITNESS ourfelf at Westminster, the twentieth day of August, in the thirtieth year of our reign. Because Willoughby earl of Abingdon, the chief lord of our reign. Because willoughly can of the that fee, hath thereupon remised unto us his court.

Sheriff's Return.

an included our received and a sanger of

Pledges of Son Doe.

profecution, Rich. Roe.

Summoners of the John Den.

within named Richard.

Richard. Richard,

§. 5. The Record, with award of Battel. ministrice through a school when the

PLEAS at Westminster before fir John Willes knight, and his brethren, justices of the bench of the lord the king at Westminster, of the term of faint Michael in the thirtieth year of the reign of the lord GEORGE the second, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, &c.

Oxon, 7 WILLIAM Kent, esquire, by James Writ. to wit. S Parker his attorney, demands against Richard Allen, gentleman, one melfuage and twenty acres of land. with the appurtenances, in Dorchester, as his right and inheritance. by writ of the lord the king of right, BECAUSE Willoughby earl of Abingdon the chief lord of that Dominus remis fee hath now thereupon remifed to the lord the fit curiam. king his court. AND WHEREUPON he faith, that he himself was seised of the tenements aforefaid, with the appurcenances, in his demelne as of fee and right in the time of peace, in the time of the lord Groker the Continuence. first late king of Great Britain, by taking the esplees Esplees. thereof to the value * fof ten thillings and more, which have in rents, corn, and grass.] And that such is his right he offers [suit and good proof.] AND the faid Richard Allen, by Peter Jones his attorney, comes and defends the Defence. right of the faid William Kent, and his feifin, when [and where it shall behove him,] and all [that concerns it,] and whatfoever [he ought to defend,] and chiefly the tenements aforefaid with the appurtenances as of fee and right, [namely, one meffuage and twenty acres of land, with the appurtenances, in Dorchester AND this he is Wager of Bate) ready to defend by the body of his free man, tel. George Rumbold by name, who is prefent here in court ready to defend the fame by his body, or in what manner foever the court of the ford the king shall consider that he ought to defend. And if any mischance should befal the said George (which bes are U 2fr mile W to repost were

* N. B. The clauses between hooks, in this and the subsequent numbers of the appendix, are usually no otherwise expressed in the records than by an Gc.

God desend) he is ready to desend the same by another man, who [is bounden and able to desend it.] AND the said Replication. William Kent saith, that the said Richard Allen unjustly desends the right of him the said William, and his seisin, &c, and all, &c, and whatsoever, &c, and chiefly of the tenements aforesaid with the appurtenances, as of see and right, &c. because he saith, that he himself was seised of the tenements, aforesaid, with the appurtenances, in his demesse as of see and right, in the time of peace, in the time of the said lord George the sift.

Joinder of the value, &c. AND that fuch is his right, he is prepared to prove by the body of his freeman, Henry Broughton by name, who is pre-

fent here in court ready to prove the same by his body, or in what manner soever, the court of the lord the king shall consider that he ought to prove; and if any mischance should befal the said Henry (which God defend) he is ready to prove the same by another man, who, &c. AND he eupon it is demanded of the said George and Henry, whether they are ready to make battel, as they before have

Gages given. Waged it: who fay that they are. And the fame George Rumbold giveth gage of proving; and, fuch engagement being given as the manner is, it

is demanded of the faid William Kent and Richard Allen, if they can fay any thing wherefore battel ought not to be awarded in this case;

who say that they cannot. THEREFORE IT IS

Award of Battel.

AND the said George Rumbold findeth pledges of
battel, to wit, Paul Jenkins and Charles Carter;
and the said Henry Broughton findeth also pledges
of battel, to wit, Reginald Read and Simon Taylor. AND THEREUPON day is here given as

chard Allen, to wit, on the morrow of faint Martin next coming, by the affent as well of the faid William Kent as of the faid Richard Allen. And it is commanded that each of them then have here his champion, sufficiently furnished with competent armour as becomes him, and ready to make the battel aforesaid: and that the bodies of

well to the faid William Kent as to the faid Ri-

and are yel startly shows or

them in the mean time be safely kept, on peril that shall fall thereon. AT which day here come pear.

as well the said William Kent as the said Richard Allen by their attorneys aforesaid, and the said

George Rumbold and Henry Broughton in their proper persons likewise come, sufficiently surnished with competent armour as becomes them, ready to make the battel aforesaid, as they

Adjournment had before waged it. AND hereupon day is furto Tothill Field. ther given by the court here, as well to the faid William Kent as to the faid Richard Allen, at

Tothill near the city of Westminster, in the county of Middlesex, to wit, on the morrow of the purification of the blessed virgin Mary next coming, by the assent as well of the said William as of the aforesaid

aforefaid Richard. And it is commanded, that each of them have then there his champion, armed in the form aforefaid, and that their bodies in the mean time, &c. At which day here, to wit, at Tothill aforefaid, comes the faid Richard Allen by his attorney aforefaid, and the faid George Rumbold and Henry Broughton in their proper persons likewise come, sufficiently furnished with competent armour as becomes them, ready to make the battel aforefaid, as they before had waged it. And the faid William Kent being folemnly called doth not come, nor hath profecuted his writ aforefaid, THEREFORE IT IS CON- Plaintiff nonfuit. SIDERED, that the same William and his pledges of profecuting, to wit, John Doe and Richard Roe, be in mercy for his false complaint, and that the same Richard go thereof without a day, &c. and also that the Final judgment, faid Richard do hold the tenements aforesaid with for the Defenthe appurtenances, to him and his heirs, quit of dant the faid William and his heirs, for ever, &c.

§. 6. Trial by the grand Affife.

-And the faid Richard Allen, by Peter Defeace. Jones his attorney, comes and defends the right of the faid William Kent, and his feifin, when, &c. and all, &c. and whatfoever, &c. and chiefly of the tenements aforefaid with the appurtenances, as of fee and right, &c, and puts himself upon the grand affife of the lord the king, and prays recognition to be made, whether he himself hath Mise. greater sight to hold the tenements aforefaid with the appurtenances to him and his heirs as tenants thereof as he now holdeth them, or the faid William to have the faid tenements with the appurtenances as he above demandeth nes Harris. them. AND he tenders here in court fix shillings Tender of the and eight pence to the use of the lord the now king, demi-mark. &c. for that, to wit, it may be inquired of the time [of the seisin alleged by the said William.] And he therefore prays, that it may be inquired by the affife, whether the faid William Kent was feifed of the tenements aforefaid with the appurtenances in his demelne as of fee in the time of the faid lord the king GEORGE the first, as the said William in his demand before hath alleged. THEREFORE it is commanded Summons of the the sheriff, that he summon by good summoners knights. four lawful knights of his county, girt with fwords, that they be here on the octaves of faint Hilary next coming, to make election of the affise aforesaid. The same day is given as well to the faid William Kent as to the faid Richard Allen, here, &c. At which day here come as well the faid William Kent as the faid Richard Allen; and the sheriff, to wit, fir Adam Alstone knight now returns, that he had caused to be summoned Charles Stephens, Randal Wheler, Toby Cox, and Return. Thomas

Thomas Munday, four lawful knights of his county, girt with fwords, by John Doe and Richard Roe his bailiffs, to be here at the faid of aves of faint Hilary, to do as the faid, writ thereof commands and requires; and that the faid fummoners, and each of them, are mainprized by John Day and James Fletcher.

Election of the Whereupon the faid Charles Stephens, Randal Wheler, Toby Cox, and Thomas Munday, four Jury. lawful knights of the county aforesaid, girt with

fwords, being called, in their proper persons come, and, being fworn, upon their oath in the presence of the parties aforesaid chose of themselves and others twenty-four, to wit, Charles Stephens, Randal Wheler, Toby Cox, Thomas Muaday, Oliver Greenway, John Boys, Charles Price, knights, Daniel Prince, William Day, Roger Lucas, Patrick Fleming, James Harris, John Richardson, Alexander Moor, Peter Payne, Robert Quin, Archibald Stuart, Bartholomew Norton, and Henry Davis esquires, John Porter, Christopher Ball, Benjamin Robinson, Lewis Long, William Kirby, gentlemen, good and lawful men of the county aforefaid, who neither are of kin to the faid William Kent nor to the faid Richard Al-

len, to make recognition of the grand affife Venire facial. aforefaid, THEREFORE it is commanded the theriff, that he cause them to come here from the

day of eafter in fifteen days, to make the recognition aforefaid. The fame day is there given to the parties aforefaid. At which day here come as well the faid William Kent as the faid

Jury fworn. Richard Allen, by their attorneys aforefaid, and the recognitors of the affife whereof mention is above made being called come, and certain of them, to wit, Charles Stephens, Randal Wheler, Toby Cox, Thomas Munday, Char-

les Price, knights, Daniel Prince, Roger Lucas, William Day, James Harris, Peter Payne, Robert Quin, Henry Davis, John Por-

ter, Christopher Bail, Lewis Long, and William Kirby, being elected, tried, and fworn, up-Verdict for the on their oath fay, that the faid William Kent hath more right to have the tenements aforefaid with Plaintiff. the appurtenances to him and his heirs, as he de-

mandeth the same, than the said Richard Allen to hold the same as he now holdeth them according as the faid William Judgment. Kent by his writ aforefaid bath supposed. THERE-FORE IT IS CONSIDERED, that the faid

William Kent do recover his seifin against the said Richard Allen of the tenements aforesaid with the appurtenances, to him and his heirs, quit of the faid Richard Allen and his heirs, for ever : and the faid Richard Allen in mercy, &cc.

By the state of Edition Williams

er on burner hard he just menegar com.

21

21

No. II.

on and prior year of the Marie Marie at one of the fall of the

Proceedings on an Action of trespass in BJECTMENT, by Original, in the King's Bench.

§ 1. The Original Writ.

GEORGE the second by the grace of God of Si fecerit te fe-Great Britain, France, and Ireland king, defen- curum. der of the faith, and to forth; to the theriff of Berkshire, greeting. IF Richard Smith shall give you security of profecuting his claim, then put by gage and fafe pledges William Stiles, late of Newbury, gentleman, fo that he be before us on the morrow of All-Souls, wherefoever we shall then be in England, to shew wherefore with force and arms he entered into one melluage, with the appurtenances, in Sutton, which John Rogers, efquire, . hath demised to the aforesaid Richard, for a term which is not yet expired, and ejected him from his faid farm, and other enormities to him did, to the great damage of the faid Richard, and against our peace. And have you there the names of the pledges, and this writ. WITNESS ourfelf at Westminster, the twelfth day of October, in ... the twenty ninth year of our reign.

Sheriff's return.

Pledges of John Doe.

Profecution, Richard Roe.

The within named William Stiles is atRich.Fen. [John Den. tached by pledges,

§. 2. Copy of the Declaration against the casual Ejector; who gives Notice thereupon to the Tenant in Poffession.

Michaelmas, the 29th of king George the fecond.

Berks, 7 WILLIAM Stiles, late of Newbury to wit. I in the faid county, gentleman, was Declaration. attached to answer to Richard Smith, of a plea, wherefore with force and arms he entered into one messuage, with the appurtenances, in Sutton in the county aforesaid, which John Rogers efquire demised to the said Richard Smith for a term which is not yet expired, and ejected him from his faid farm, and other wrongs to him did, to the great damage of the faid Richard, and against the peace of the lord the king, &c. And where-UA

upon the faid Richard by Robert Martin his attorney complains, that whereas the faid John Rogers on the fi ft day of Ostober in the twenty pinth year of the reign of the lord the king that now is, at Sutton aforesaid, had demised to the same Richard the tenement aforesaid, with the appurtenances, to have and to hold the faid tenement, with the appurtenances, to the faid Richard and his affigns, from the feast of faint Michael the archangel then last past, to the end and term of five years from thence next following and fully to be complete and ended, by virtue of which demise the said Richard entered into the faid tenement, with the appurtenances, and was thereof poffeffed; and, the faid Richard being so possessed thereof, the faid William afterwards, that is to say, on the said first day of October in the said twenty ninth year, with force and arms, that is to say, with swords, staves, and knives, entered into the said tenement, with the appurtenances, which the faid John Rogers demised to the faid Richard in form aforesaid for the term aforesaid which is not yet expired, and ejected the faid Richard out of his faid farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the faid lord the king; whereby the faid Richard faith, that he is injured and damaged to the value of twenty pounds. And thereupon he brings suit, &c.

Martin, for the plaintiff.

Peters, for the defendant.

Pledges of profecution,

Richard Roe.

Mr. George Saunders,

Notice, title to, the premises mentioned in this declaration of ejectment, or to some part thereof; and I, being sued in this action as a casual ejector, and having no claim or title to the same, do advise you to appear next Hilary term in his majesty's court of king's bench at Westminster, by some attorney of that court, and then and there, by a rule to be made of the same court, to cause yourself to be made desendant in my stead; otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.

Your loving friend,

5. January, 1756.

William Stiles.

AND WHERETON HOW TO AND WHERETEON HOLD

d

n

h

d

r

d

d

8

§. 3. The Rule of Court.

Hilary Term, in the twenty ninth Tear of King GEGRGE the or will a black a shorten fecond. The a top of of of the best on

Berks, J IT IS ORDERED by the court, by Smith against to wit. I the affent of both parties, and their Stiles; for one attorneys, that George Saunders, gentleman, may messuage with be made defendant, in the place of the now defen- the appurtenandant William Stiles, and shall immediately appear ces in Sutton, to the plaintiff's action, and shall receive a decla- on the dernife of ration in a plea of trespass in ejectment of the John Rogers. tenements in question, and shall immediately plead disk and disk

and the summer of the fall the tenement, with the

thereto, not guilty: and upon the trial of the iffue, shall confess leafe, entry, and ouster, and infift upon his title only. And if, upon trial of the iffue, the faid George do not confess leafe, entry, and ouster, and by reason thereof the plaintiff cannot profecute his writ, then the taxation of costs upon such nonprof. shall cease, and the faid George shall pay such costs to the plaintiff, as by the court of our lord the king here shall be taxed and adjudged for such his default in nonperformance of this rule; and judgment shall be entered against the faid William Stiles, now the cafual ejector, by default. And it is further ordered, that, if upon the trial of the faid iffue a verdict shall be given for the defendant, or if the plaintiff shall not profecute his writ, upon any other cause, than for not confessing lease, entry and ouster as aforesaid, then the lessor of the plaintiff shall pay costs, if the plaintiff himself doth not pay them.

By the Court,

Martin, for the plaintiff. Newman, for the defendant,

that the former desident editor tradent of tenesion § 4. The Record.

PLEAS before the lord the king at Westminster, of the term of faint Hilary, in the twenty ninth year of the reign of the lord GEORGE the second by the grace of God of Great Britain, France, and Ireland, king, desender of the faith, &c.

Berks, ? GEORGE Saunders, late of Sutton in the county to wit. Saforesaid, gentleman, was attached to answer Richard Smith, of a plea, wherefore with force and arms he entered into one messuage, with the appurtenances, in Sutton, which John Rogers, esquire, hath demised to the said Richard for a term which is not yet. expired, and ejected him from his faid farm, and other wrongs to him did, to the great damage of the faid Richard, and against the peace

of the lord the king that now is. AND WHEREUPON the faid Richard, by Robert Martin his attorney complains, that whereas the faid John Rogers on the first day Declaration, or of October in the twenty ninth year of the reign of count.

the lord the king that now is, at Sutton aforefaid, had demised to the same Richard the tenement aforesaid, with the appurtenances, to have and to hold the faid tenement, with the appurtenances, to the faid Richard and his affigns, from the feast of faint Michael the archangel then last past, to the end and term of five years from thence next following and fully to be complete and ended; by virtue of which demife the faid Richard entered into the faid tenement, with the appurtenances, and was thereof possessed: and, the faid Richard being to possessed thereof, the faid George afterwards, that is to lay, on the first day of October in the said twenty ninth year, with force and arms, that is to fay, with fwords, staves, and knives, entered into the faid tenement, with the appurtenances, which the faid John Rogers demifed to the faid Richard in form aforefaid for the term aforefaid which is not yet expired, and ejected the faid Richard out of his faid farm, and other wrongs to him did. to the great damage of the faid Richard, and against the peace of the faid lord the king; whereby the faid Richard faith that he is injured and endamaged to the value of twenty pounds: and thereupon he brings fuit, [and good proof.] AND theraforesaid

Defence. George Saunders, by Charles Newman his attor-Plea not guilty. [and where it shall behove him;] and faith that he confession. Mpe.

Venire awarded.

fame: THEREFORE let a jury come thereupon before the lord the king, on the octave of the purification of the bleffed virgin Mary, wherefoever he shall then be in England; who neither [are of kin to the faid Richard, nor to the faid George;] to recognize [whether the faid George be guilty of the trespass and ejectment aforeiaid :] because as well [the faid George, as the faid Richard, between whom the difference is, have put themselves on

ney, comes and defends the force and injury, when

is in no wife guilty of the trespass and ejectment

aforefaid, as the faid Richard above complains

against him; and thereof he puts himself upon the country: and the faid Richard doth likewise the

the faid fury.] The same day is there given to the parties aforefaid. AETERWARDS the process

before the lord the king until the day of Easter in

Respite, for default of jurors. therein, being continued between them in respite,

fifteen days, wherefoever the faid lord the king Nifi prius. shall then be in England; unless the justices of the lord the king affigned to take affies in the county aforefaid, thall have

come before that time, to wit, on Monday the eight day of March, at Reading in the faid county, by the form of the statute [in that case provided,] by reason of the default of the jurors, [summoned to appear as aforesaid.] At which day before the lord the king, at Westminster, come the parties aforesaid by their attorneys aforesaid;

and

and the aforesaid justices of affise, before whom the jury aforesaid came] fent here their record before them had in these words, to wit: AFTERWARDS, at the Postea.

day and place within contained, before Heneage

Legge, efquire, one of the barons of the exchequer of the lord the king, and fir John Eardly Wilmot, knight, one of the justices of the said lord the king, assigned to hold pleas before the king himself, justices of the said lord the king, assigned to take assiss in the county of Berks by the form of the statute [in that case provided,] come as well the within named Richard Smith, as the within written George Saunders, by their attorneys within contained; and the jurors of the jury whereof mention is within made being called, certain of them, to wit, Charles Holloway, John Hooke, Peter Graham, Henry Cox, William Brown, and Francis Oakley, come,

and are fworn upon that jury: and because the rest of the jurors of the same jury did not appear, Tales decircumtherefore others of the by-standers being chosen by stantibus.

the shereff, at the request of the said Richard

Smith, and by the command of the justices aforesaid, are appointed anew, whose names are affixed to the panel within written, according to the form of the statute in such case made and provided; which said jurors so appointed a-new, to wit, Roger Bacon, Thomas Small, Charles Pye, Edward Hawkins, Samuel Roberts, and Daniel Parker, being likewise called, come; and, together with the

other jurors aforesaid before impanelled and sworn, being elected, tried, and sworn, to speak the truth verdict for the of the matter within contained, upon their oath plaintiff.

say, that the aforesaid George Saunders is guilty of the trespass and ejectment within-written, in manner and form as the aforesaid Richard Smith within complains against him; and alsess the damages to the said Richard Smith, on occasion of that trespass and ejectment, besides his costs and charges which he hath been put unto about his suit in that behalf, to twelve pence and, for those costs and charges, to forty shillings. WHEREUPON the said Richard Smith, by his attorney aforesaid, prayeth judgment against the said George Saunders, in and upon the verdict aforesaid by the

jurors aforesaid given in the form aforesaid: and the said George Saunders, by his attorney afore- Motion in arrest said, saith that the court here ought not to pro- of Judgment.

prayeth that judgment upon the said verdict, and prayeth that judgment against him the said George Saunders, in an supon the verdict aforesaid by the jurors aforesaid given in the form aforesaid, may be stayed, by reason that the said verdict is insufficient and erroneous, and that the same verdict may be quashed, and that the issue aforesaid may be tried a new by other

jurors to be fresh impanelled. And, because Continuance.

the court of the lord the king here is not yet advised of giving their judgment of and upon the premises, therefore day thereof is given as well to the said Richard Smith as the said George Saunders, before the lord the king, until the morrow

di

A

af

th

N

in

PI

pre

and

to

gag

the

W

wh

wh tav the kni twe

of the Ascention of our lord, wheresoever the said lord the king shall then be in England, to hear their judgment of and upon the premises, for that the court of the lord the king is not yet advised thereof. At which day before the lord the king, at Westminster, come the parties aforesaid by their attorneys aforesaid: upon which, the record and matters aforefaid having been feen, and by the court of the lord the king now here fully understood, and all and singular

the premiles having been examined, and mature Opinion of the deliberation being had thereupon, for that it feems to the court of the lord the king now here that the verdict aforelaid is in no wife infufficient or erroneous, and that the same ought not to be quashed, and that no new

Judgment, for the plaintiff.

trial ought to be had of the iffue aforefaid, THEREFORE IT IS CONSIDERED, that the faid Richard do recover against the said George his term yet to come, of and in the faid tenements, with the appurtenances, and the faid damages affelfed by the faid jury

Cofts.

in form aforesaid, and also twenty seven pounds fix shillings and eight pence for his costs and charges aforefaid, by the court of the lord the king here

awarded to the faid Richard, with his affent, by way of increase; which faid damages in the whole amount to twenty Capiaturprofine. nine pounds, seven shillings, and eight pence.

And let the said George be taken, [until he maketh fine to the lord the king] AND HERE-

Writ of peffelfion,

and return.

UPON the said Richard by his attorney aforesaid prayeth a writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause him

to have possession of his term aforelaid yet to come, of and in the tenements aforelaid, with the appurtenances: and it is granted unto him, returnable before the lord the king on the

morrow of the holy Trinity, wherefoever he shall then be in England. At which day before the lord

And Carrier Commons, best of and

the king, at Westminster, cometh the said Richard by his attorney aforesaid; and the sheriff, that is to say, fir Thomas Reeve, knight, now fendeth, that he by virtue of the writ aforesaid to him directed on the ninth day of June last past, did cause the said Richard to have his possession of his term aforesaid yet to come, of and in the tenements aforefaid, with the appurtenances, as he was commanded.

No. III.

Proceedings on an Action of DEBT, in the Court of Common Pleas; removed into the King's Bench by Writ of ERROR.

§. 1. Original.

Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. COMMAND Charles Long, late of Burford, gentleman, that justiy and without delay be render to William Burton two hundred pounds, which he owes him and unjustly detains, as he saith. And unless he shall so do, and if the said William shall make you secure of prosecuting his claim, then summon by good summoners the aforesaid Charles, that he be before our justices at Westminster, on the octave of St. Hilary, to shew wherefore he hath not done it. And have you there then the summoners, and this writ. WIT-NESS ourself at Westminster, the twenty-sourch day of December, in the twenty-eighth year of our reign.

Sheriff's return.

Pledges of J. Doe. profecution. R.Roe.

Summoners of the with- SR Morris. in named Charles Long. H. Johnson.

§ 2. Procefs.

GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. PUT by Pone. gage and safe pledges Charles Long, late of Burford, gentleman, that he be before our justices at Westminster on the octave of the purification of the blessed Mary, to answer to William Burton of a plea, that he render to him two hundred pounds which he owes him and unjustly detains, as he faith; and to shew wherefore he was not before our justices at Westminster on the octave of saint Hilary, as he was summoned And have there then the names of the pledges and this writ. WITNESS fir John Willes, knight, at Westminster, the twenty third day of January in the twenty-eighth year of our reign.

Sheriff's return.

The within named Charles Long is at- Bedward Leigh.
tached by pledges.

Robert Tanner.
GEORGE

ta

W

CO

16

16

"

"

" C

15

66 t

1 t

" it

" G

" de

" th

" fre

" W

" hu

" fail

" W

" tw

66 7

" in I

" ing

OEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Ox-

fordshire, greeting. WE command you that you distrein Charles Long, late of Burford, Gentleman, by all his lands and chattels within your bailiwick, so that neither he nor any one through him may lay hands on the same, until you shall receive from us another command thereupon; and that you answer to us of the issues of the same; and that you have his body before our justices at Westminster from the day of Easter in sisteen days, to answer to William Burton of a Plea, that he render to him two hundred pounds which he owes him and unjustly detains, as he saith, and to hear his judgment of his many defaults. WITNESS fir John Willes, knight, at Westminster, the twelfth day of February, in the twenty eighth year of our reign.

Sheriff's return. The within-named Charles Long hath nothing in Nibil. my bailiwick, whereby he may be diffreined.

Capias ad refpondendum. Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of

Oxfordshire, greeting. WE command you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, from the day of Easter in five weeks, to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith: and whereupon you have returned to our justices at Westminster, that the said Charles hath nothing in your bailiwick, whereby he may be distreined. And have you there then this writ. WITNESS sir John Willes, knight, at Westminster, the sixteenth day of April, in the twenty eighth year of our reign.

Sheriff's return. The within namedCharles Long is not found in Non est inventus. my bailiwick.

GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Berkshire, greeting. WE command you, that you take Charles Long late of Bursord, gentleman, if he may be found in your bailiwick and him safely keep, so that you may have his body before our justices at Westminster, on the morrow of the holy Trinity, to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith: and whereupon our sheriff of Oxfordshire hath made a return to our justices at Westminster, at a certain day now past, that the aforesaid

f

e

er

s,

k,

it.

th

in

0

ler

rk

ng

ck.

ces

to

w

he

the

aid

aforesaid Charles is not sound in his bailiwick; and thereupon it is testified in our said court, that the aforesaid Charles lurks, wanders, and runs about in your county. And have you there then this writ. WITNESS fir John Willes, knight, at Westminster, the seventh day of May, in the twenty eighth year of our reign.

By virtue of this writ to me directed, I have Sheriff's return.
taken the body of the within named Charles Long; Cepi Corpus,
which I have ready at the day and place within
contained, according as by this writ it is commanded me.

"Or, upon the return of Non est inventus upon the first Capias,
the Plaintiff may sue out an Alias and a Pluries; and
thence proceed to Outlawry; thus:

" GEORGE the second by the grace of God of " Alias capias.

Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. WE command you, as formerly we commanded you, that you take Charles Long, late of Bursord, gentleman, if he may be found in your bailiwick, and him fafely keep, so that you may have his body before our justices at Westminster, on the morrow of the holy Trinity, to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith. And have you there then this writ. WITNESS fir John Willes, knight, at Westminster,

"The within named Charles Long is not found "Sheriff's rein my bailiwick. "turn. Non eft
in wentus.

" the feventh day of May, in the twenty eighth year of our reign.

"GEORGE the fecond by the grace of God of "Pluries capias." Great Britain, France and Ireland, king, defen-

"der of the faith, and so sorth; to the sheriff of Oxfordshire, greeting. WE command you, as we have more than once commanded you, that you take Charles Long, late of Bursord, gentleman, if the may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, from the day of the holy Trinity in three weeks, to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him, and unjustly detains, as he saith. And have you there then this writ. WITNESS fir John Willes, knight at Westminster, the thirteenth day of May, in the twenty eighth year of our reign.

"The within-named Charles Long is not found in my bailiwick.

" Sheriff's re-

" ventus.

GEORGE

.

.

.

66

.

"

66

66

66

" GEORGE the second by the grace of God " Exigi facias. " of Great Britain, France, and Ireland king, defender of the faith, and fo forth; to the fheriff " of Oxfordshire, greeting. WE command you, that you cause " Charles Long, late of Burford, gentleman, to be required from " county court to county court, until according to the law and cuftom of our realm of England he be outlawed, if he doth not ap-" fafely kept, so that you may have his body before our justices at "Wellminster, on the morrow of All Souls, to answer to Wil-" liam Burton, gentleman, of a plea, that he render to him two "hundred pounds, which he owes him and unjustly detains, as he " faith. And whereupon you have returned to our justices at West-" minster, from the day of the holy Trinity in three weeks, that he is not found in your bailiwick. And have you there then this " writ. WITNESS fir John Willes, knight, at Westminster, the " eighteenth day of June, in the twenty-eighth year of our reign.

" By virtue of this writ to me directed, at my Sheriff's return. " county court held at Oxford in the county of " Primo Exac-" Oxford, on Thursday the twenty first day of tus : " June, in the twenty ninth year of the reign of " the lord the king within written, the within named Charles Long " was required the first time, and did not appear: and at my county " court held at Oxford aforefaid, on Thurlday the twenty fourth " day of July in the year aforesaid, the saidCharles " Secundo exac-" Long was required the second time, and did " not appear: and at my county court held at Oxford aforesaid, on Thursday the twenty first a tus: " day of August, in the year aforesaid, the said " Tertio exac-" Charles Long was required the third time, and " did not appear: and at my county court held at se tus: " Oxford aforesaid, on Thursday the eighteenth day " of September in the year aforesaid, the said " Quarto exac-" Charles Long was required the fourth time, and "did not appear: and at my county court held 46 gus: " at Oxford aforefaid, on Thursday the sixteenth " day of October in the year aforesaid, the said Charles Long, " was required the fifth time, and did not apu Quinto exac-" pear: therefore the faid Charles Long, by the " judgment of the coroners of the faid lord the st tus : " king, of the county aforefaid, according to the " Ideo utlaga-" law and custom of the kingdom of England is 66 tus. " outlawed.

"GEORGE the second by the grace of God clamation. "GEORGE the second by the grace of God felamation. "GEORGE the second by the grace of God felamation. "GEORGE the second by the grace of God felamation. "GEORGE the second by the grace of God felamation. "GEORGE the second by the grace of God felamation."

" of Oxfordshire, greeting: WHEREAS by our writ we have lately

H

g,

ife

m

uf-

pbe

at il-

wo

he

ft-

he

his

he

r.y

0

01

ng

ity

th

es

fid

at

rft

aid

nd

at

ay

iid

nd

eld th

p-

he

he

he

is

cd

le-

iff

ed

" commanded you that you should cause Charles Long, late of Bur-" ford, gentleman, to be required from county court, to county court, " until according to the law and custom of our realm of England "he shall be outlawed, if he did not appear: and if he "did appear, then that you should take him and cause him to be " safely kept, so that you might have his body before our justices at "Westminster, on the morrow of All-Souls, to answer to William "Burton, gentleman, of a plea, that he render to him two hundred " pounds, which he owes him and unjustly detains, as he faith: " WHEREFORE we command you, by virtue of the flatute in the " thirty first year of the lady Elizabeth late queen of England made " and provided, that you cause the said Charles Long to be pro-" claimed upon three feveral days according to the form of that sta-" tute; (whereof one proclamation shall be made at or near the most " usual door of the church of the parish wherein he inhabits) that " he render himself unto you; so that you may have his body be-" fore our justices at Westminster at the day aforesaid, to answer the " faid William Burton of the plea aforefaid. And have you there " then this writ. WITNESS fir John Willes, knight, at West-" minster, the eighteenth day of June, in the twenty eighth year " of our reign.

"By virtue of this writ to me directed, at "Sheriff's re"my county court held at Oxford in the county "turn.
"of Oxford, on Thursday the twenty fixth day of "Proclamari
"June in the twenty ninth year of the reign of the "feci.

"lord the king within written, I caused to be proclaimed the first time; and at the general quarter sessions of the
peace, held at Oxford aforesaid on Tuesday the fisteenth day of
July in the year aforesaid, I caused to be proclaimed the second
time; and at the most usual door of the church of Burford withinwritten on Sunday the third day of August in the year aforesaid,
immediately after divine service, one month at the least before
the within named Charles Long was required the fifth time, I
caused to be proclaimed the third time that the said Charles
Long should render himself unto me, as within it is commanded
me.

"GEORGE the second by the grace of God of "Capias utla"Great Britain, France, and Ireland king, de- "gatum.

" fender of the faith, and fo forth; to the fheriff

"of Berkshire, greeting. WE command you that you omit not by reason of any liberty of your county, but that you take Charles Long, late of Bursord in the county of Oxford, gentleman, (being outlawed in the said county of Oxford, on Thursday, the sixteenth day of October last past, at the suit of William Burton, gentleman, of a plea of debt, as the sheriff of Oxfordshire aforesaid returned to our justices at Westminster on the morrow of All-Souls then next ensuing) if the said Charles Long may be found

N

46

16

11

66

16

44

66 .

"

66

46

16

4

16 6 1

16. 7

16 .

9.

Ch

gen COL COL

law cer

pay

- . 46 in your bailiwick; and him fafely keep, fo that you may have " his body before our justices at Westminster from the day of saint
- Martin in fifteen days, to do and receive what our court shall con-" fider concerning him in this behalf. WITNESS fir John Willes,
- " knight, at Westminster, the fixth day of November, in the " twenty ninth year of our reign.
- " By virtue of this writ to me directed, I have " Sheriff's re-
- " taken the body of the within-named Charles Long; which I have ready at the day and place se turn;
- " within-contained, according as by this writ it " Cepi corpus. " is commanded me.
- 46 6. 3. * Bill of Middlefex, and Latitat thereupon, in the Court of King's Bench.
- " Middlefex, ? " THE SHERIFF is command-" Bill of Middle-" to wit. 3" ed that he take Charles Long, " fex for trefpale.
 - " late of Burford in the county of Oxford, if he
- " may be found in his bailiwick, and him fafely keep, so that he
- " may have his body before the lord the king at Westminster, on Wednesday next after fifteen days of Easter, to answer William
- " Burton, gentleman, of a plea of trespass; [AND ALSO to a bill
- of the said William against the aforesaid Charles, for two bundred
- of pounds of debt, according to the custom of the court of the faid
- " lord the king, before the king himfelf to be exhibited ;] and that " he have there then this precept.
 - " The within named Charles Long is not found
- " Sheriff's rein my bailiwick.
- " turn. Noneft " GEORGE the second by the grace of God of
- Great Britain, France, and Ireland king, dea inventus. " Latitat.
 - " of Berkshire, greeting. WHEREAS we lately " commanded our sheriff of Middlesex that he
- " should take Charles Long of Burford in the county of Oxford, if " he might be found in his baliwick, and him fafely keep, fo that
- " he might be before us at Westminster, at a certain day now past,
- " to answer unto William Burton, gentleman, of a plea of trespass; " [AND ALSO to a bill of the faid William, against the aforefaid
- " Charles, for two hundred pounds of debt, according to the custom
- " of our court, before us to be exhibited ;] and our said sheriff of
 - " Middlesex at that day returned to us that the aforesaid Charles
- " was not found in his bailiwick: thereupon on & Ac etiam. " the behalf of the aforesaid William in our court
 - " before us it is sufficiently attested, that the aforesaid
- * Note, that §. 3. and §. 4, are the usual method of process, to compel an appearance, in the court of king's bench and exchequer; in which the practice of those courts does principally differ from that of the court of common pleas: the subsequent stages of proceeding being nearly alike in them all.

nt n-

s,

le

28

e

it

e

1

n

11

d

d

it

d

of

-

ff

y

e

if

it

,

; d

n

f

n

t

e

d

0

t

"aforesaid Charles lurks and runs about in your county; THERE"FORE we command you, that you take him, if he may
be found in your bailiwick, and him safely keep, so that
you may have his body before us at Westminster on Tuesday
next after five weeks of Easter, to answer to the aforesaid William
of the plea [and bill] aforesaid: and have you there then this writ.
"WITNESS sir Dudley Ryder, knight, at Westminster, the
eighteenth day of April, in the twenty eighth year of our reign.
"By virtue of this writ to me directed, I have

"taken the body of the within-named Charles "Sheriff's re"Long; which I have ready at the day and "turn; Cepi
"place within-contained, according as by this "corpus
"writ it is commanded me.

S. 4. Writ of Quo minus in the Exchequer.

" GEORGE the second by the grace of God of Great Britain, " France, and Ireland king, defender of the faith, and fo forth; " to the heriff of Bershire, greeting. WE command you, that "you omit not by reason of any liberty of your county, but that you "enter the same, and take Charles Long, late of Burford in the "county of Oxford, gentleman, where soever he shall be found in your bailiwick, and him fafely keep, fo that you may have his " body before the barons of our exchequer at Westminster, on the " morrow of the holy Trinity, to answer William Burton our debtor " of a plea, that he render to him two hundred pounds which he " owes him and unjustly detains, whereby he is the less able to sa-" tisfy us the debts which he owes us at our faid exchequer, as he faith he can reasonably shew that the same he ought to render: " and have you there this writ. WITNESS fir Thomas Parker. knight, at Westminster, the fixth day of May, in the twenty eighth " year of our reign.

"By virtue of this writ to me directed, I have
"taken the body of the within-named Charles "Sheriff's re"Long: which I have ready before the barons "turn.
"within-written, according as within it is com"manded me."

§. 5. Special Bail; on the Arrest of the Defendant, pursuant to the Testatum Capias, in page xiv.

KNOW ALL MEN by these presents, that we Bail Bond, to Charles Long of Burford in the county of Oxford, the sheriff. gentleman, Peter Hamond of Bix in the said county, yeoman, and Edward Thomlinson of Woodstock in the said county, innholder, are held and firmly bound to Christopher Jones, esquire, sheriff of the county of Berks, in sour hundred pounds of lawful money of Great Britain, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, we bind ourselves and each

of

TI

is tr wit

y th

Ville

lo i

efore

etw

rd i

red

nanif

Villi

hat t

ed th

en i

ed p

nd ti

heer

ord a

eret

VIT.

went

TH

id w

ords

LEA

kni

king

twe

the

der

0xc

w ct

125

ounty

nund:

is he

ım,

hat w

ear el

of us by himself for the whole and in gross, our and every of or heirs, executors, and administrators, firmly by these presents, sealed with our seals. Dated the fifteenth day of May, in the twent eighth year of the reign of our sovereign lord George the second is the grace of God king of Great Britain, France, and Ireland, defender of the faith and so forth, and in the year of our Lord on thousand, seven hundred, and sifty sive.

bounden Charles Long do appear before the justices of our sovereighord the king at Westminster on the morrow of the holy Trinity, answer William Burton, gentleman, of a plea of debt of two hudred pounds, then this obligation shall be void and of none effect,

elfe shall be and remain in full force and virtue.

Sealed, and delivered, being first duly stamped, in the presence of Henry Shaw.

Timothy Griffith.

Charles Long. (L. S.)
Peter Hamond. (L. S.)
Edward Thomlinion. (L. S.)

Recognizance of YOU Charles Long do acknowlege to owe un bail, before the the plaintiff four hundred pounds; and you John Rose and Peter Hamond do severally acknowle to owe unto the same person the sum of two hundred pounds apiece, to be levied upon your several goods and chatter lands and tenements, UPON CONDITION that, if the defendant condemned in this action, he shall pay the condemnation, or read himself a prisoner in the Fleet for the same; and, if he sail so to you John Rose and Peter Hamond do undertake to do it for him.

Trinity Term, 28 GEO. II.

Bail-piece.

Be ks, JON a Testatum capias against Chatowit. Sless Long, late of Bursord in the country of Oxford, gentleman, returnable on the morrow of the horizonty, at the suit of William Burton, of a plea of debt of the hundred pounds;

THE BAIL, are, John Rose, of Witney in the county of O ford, esquire. Peter Hamond, of Bix in the sa

county, yeoman.

Richard Price, attorney }

The party himself in £400. Each of the bail in £200.

Taken and acknowleged the twenty eighth day of May, in the year of our Lord one thousand, seven hundred, and fifty five de bene esse, before me,

Robert Grove, one of the commissioners,

in to the store of the supplier of the field

ola

le

hu

te

nt

nd

o d

ho

ftv

0

(a

Liver of produced S. 6. The Record, as removed by Writ of ERROR.

to the laid, William THE LORD the king hath given in charge to strufty and beloved fir John Willes, knight, his Writ of error, nit closed in these words: GEORGE the second the grace of God of Great Britain, France, and Ireland king, dender of the faith, and so forth; to our trusty and beloved fir John files, knight, greeting. BECAUSE in the record, and process, and in the giving of judgment, of the plaint which was in our court fore you, and your fellows, our justices of the bench, by our writ, tween William Burton, gentleman, and Charles Long, late of Burrd in the county of Oxford, gentleman, of a certain debt of two huned pounds, which the faid William demands of the faid Charles, samifest error hath intervened, to the great damage of him the faid villiam, as we from his complaint are informed; we, being willing at the error, if any there be, should be corrected in due manner. d that full and speedy justice should be done to the parties aforedin this behalf, do command you, that, if judgment thereof be given, en under your feal you do distinctly and openly fend the record of process of the plaint aforesaid, with all things concerning them, d this writ; fo that we may have them from the day of Easter in teen days, wherefoever we shall then be in England: that, the rend and process aforesaid being inspected, we may cause to be done ereupon, for correcting that error, what of right and according to e law and custom of our realm of England ought to be done. ITNESS ourself at Westminster, the twelfth day of February, in the wenty ninth year of our reign.

THE RECORD and process, whereof in the Chief justice's d writ mention above is made, follow in these return. carry referes, treinglier, and dean de whatforser : itw ot , abro

LEAS at Westminster before fir John Willes, The record. knight, and his brethren, justices of the lord the and and and king at Westminster, of the term of the holy Trinity in the twenty eighth year of the reign of the lord GEORGE the fecond by the grace of God of Great Britain, France, and Ireland king, defender of the faith. &c. how ad chencitagillo and anat

" ele to be and temaid in full force and viell Oxon, 7 CHARLES Long, late of Bufford Writ. to wit. I in the county aforefaid, gentleman. s summoned to answer William Bustons of Yarnton in the faid unty, gentleman, of a plea that he render unto him two hundred punds, which he owes him and unjustly detains, 100 100 he faith.] AND WHEREUPON the faid Wil- Declaration, or im, by Thomas Gough his attorney, complains, count, on a bond. at whereas on the first day of December, in the er of our lord one thousand, seven hundred, and fifty four, at Banmy in this county, the faid Charles by his writing obligatory did acthe bond, and

award.

de

m!

12

be

art

in

firf

cor

rea

Wi

and

the

ibo

ong

ter

frit

in t

red

for

he i

orde

nd i

her

ind i

orden

my t

hat

he fa

the f

in th even

aid 4

aid f

he f

ervec

the f

alfille

the fa

not hi

odgm

ioned

udged

les fai

Willia

and th

for the

tpon a

no nec manne

knowlege himself to be bound to the said William in the said sum of two hundred pounds of lawful money of Great Britain, to be paid to the faid William, whenever after the faid Charles should be thereto required; nevertheless the faid Charles (although often re quired) hath not paid to the faid William the faid fum of two hundred pounds, nor any part thereof, but hitherto altogether hath refused and doth still refuse, to render the same; wherefore he saith that he

is injured, and hath damage to the value of te pounds: and thereupon he brings fuit, [and good Profert in curia. proof] AND he brings here into court the writing obligatory aforesaid in form aforesaid; the date whereof is the

day and year before-mentioned. AND the afore faid Charles, by Richard Price his attorney Defence. comes and defends the force and injury when

[and where it shall behave him,] and craves over of the said writin obligatory, and it is read unto him [in the form aforefaid:] he like

wife craves over of the condition of the faid wri Over prayed of ting, and it is read unto him in these words "The condition of this obligation is fuch, that condition, viz. " if the above bounden Charles Long, his heir to perform an "executors and administrators, and every of them " shall and do from time to time, and at all time " hereafter, well and truly stand to, obey, ob

" ferve, fulfil, and keep, the award, arbitrament, order, rule " judgment, final end, and determination of David Stiles, of Wood " flock, in the faid county, clerk, and Henry Bacon, of Wood " flock aforefaid, gentleman, (arbitrators indifferently nominate " and chosen by and between the said Charles Long and the above

" named William Burton, to arbitrate, award, order, rule, jadge " and determine, of all and all manner of actions, cause or cause

of action, fuits, plaints, debts, duties, reckonings, accounts controversies, trespasses, and demands whatsoever had, moved " or depending by and between the faid parties, for any matter " cause, or thing, from the beginning of the world until the da

" of the date hereof) which the faid arbitrators shall make and pub " lift, of or in the premises, in writing under their hands and feals

" or otherwise by word of mouth, in the presence of two credible " witnesses, on or before the first day of January next ensuing the

" date hereof; then this obligation to be void and of none effect, o

" else to be and remain in full force and virtue." Imparlance. WHICH being read and heard, the faid Charle prays leave to imparl therein here until the octav Continuance. of the holy Trinity; and it is granted unto him The fame day is given to the faid William Burton

here, &c. At which day, to wit, on the octave of the holy Trinity here come as well the faid William Burton as the faid Charles Long by their attorneys aforefaid: and hereupon the faid William pray that the faid Charles may answer to his writ an

bosto the country the faid Charles ty has wraing obligators dat tocount aforesaid. AND the aforesaid Charles de

e

s 12

II.

m

ne ob

ile

od te

ve

ge

ıſe

nts

ed

ter

da

ub als ibl

th

, 0

ie.

fle

him

rton

nity

ong

ray ande

defends the force and injury, when, &c, and sith, that the faid William ought not to have or No fuch award.

maintain his faid action against him; because he

aith, that the faid David Stiles and Henry Bacon, the arbitrators before named in the faid condition, did not make any fuch award. abitrament, order, rule, judgment, final end, or determination, of or in the premises above specified in the said condition, on or before the fift day of January, in the condition aforesaid above mentioned, acto the form and effect of the faid condition: and this he is ready to verify. Wherefore he prays judgment, whether the faid William ought to have or maintain his faid action thereof against him;

and that he may go thereof without a day.] AND he aforesaid William saith, that, for any thing Replication;

bove alleged by the faid Charles in pleading, he fetting forth an night not to be precluded from having his faid ac- award.

ion thereof against him: because he saith that af-

er the making of the said writing obligatory, and before the said ift day of January, to wit, on the twenty fixth day of December, the year aforefaid, at Banbury aforefaid, in the presence of two redible witnesses, namely, John Dew of Charlbury, in the county foresaid, and Richard Morris of Wytham, in the county of Berks, he faid arbitrators undertook the charge of the award, arbitrament, rder, rule, judgment, final end, and determination aforesaid, of and in the premises specified in the condition aforesaid; and then and here made and published their award by word of mouth in manner nd form following, that is to fay; The faid arbitrators did award, mer, and adjudge, that he the faid Charles Long should forthwith sy to the faid William Burton the fum of seventy five pounds, and hat thereupon all differences between them at the time of the making he faid writing obligatory should finally cease and determine. And he faid William further faith, that although he afterwards, to wit, n the fixth day of January, in the year of our Lord one thousand, even hundred and fifty five, at Banbury aforefaid, requested the aid Charles to pay to him the faid William the

hid seventy five pounds, yet (by protestation that Protestando.

he said Charles hath not stood to, obeyed, obbe faid Charles ought to have been stood to, obeyed, observed, willed, and kept) for further plea therein he faith, that he faid Charles the faid feventy five pounds to the faid William hath ot hitherto paid: and this he is ready to verify. Wherefore he prays adgment, and his debt aforefaid, together with his damages occatave oned by the detention of the faid debt, to be ad-

adged unto him, &c. AND the aforesaid Char- Demurrer.

es faith, that the plea aforefaid, by him the faid

William in manner and form aforefaid above in his replication pleaded, and the matter in the same contained, are in no wife sufficient in law or the faid William to have or maintain his action aforefaid therefron against him the said Charles; to which the said Charles hath no necessity, neither is he obliged by the law of the land, in any wherefore, for manner to answer: and this he is ready to verify. Wherefore, for end

want

t

2

8 iı

2

B

gi

Č

th ki

th

ce afe

wi

for

ev 210

ha the

to DA

COL

ney

tue

Lo

afo

goo

Ch

her WI

the

givi

erre

lege

faid

reve

want of a sufficient replication in this behalf, the said Charles, as aforesaid, prays judgment, and that the aforesaid William may be

Causes of demurrer.

precluded from having his action aforefaid thereupon against him, &c. And the faid Charles, according to the form of the statute in that case made and provided, shews to the court here the causes

of demurrer following; to wit, that it doth not appear, by the replication aforefaid, that the faid arbitrators made the fame award in the presence of two credible witnesses on or before the said first day of January, as they ought to have done, according to the form and effect of the condition aforefaid; and that the replication aforefaid

Joinder in de-

is uncertain, infufficient, and wants form. AND the aforesaid William saith, that the plea aforefaid by him the said William in manner and form aforesaid above in his replication pleaded, and the

matter in the same contained, are good and sufficient in law for the faid William to have and maintain the faid action of him the faid William thereupon against the faid Charles; which said plea, and the matter therein contained, the faid William is ready to verify and prove as the court shall award: and because the aforesaid Charles hath not answered to that plea, nor hath he hitherto in any manner denied the same, the said William as before prays judgment, and his debt aforesaid, together with his damages occasioned by the de-

tention of that debt, to be adjudged unto him, Continuance. &c. AND BECAUSE the justices-here will advise themselves of and upon the premises before they

give judgment thereupon, a day is thereupon given to the parties aforelaid here, until the morrow of All-Souls, to hear their judgment thereupon, for that the faid justices here are not yet advised thereof At which day here come as well the faid Charles as the faid William, by their said attorneys; and because the said justices here will far ther advise themselves of and upon the premises before they give judgment thereupon, a day is farther given to the parties aforefaid here until the octave of faint Hilary, to hear their judgment thereupon, for that the faid justices here are not yet advised thereof. A which day here come as well the faid William Burton as the faid

court:

Opinion of the FORE, the record and matters aforesaid having been feen, and by the justices here fully understood and all and fingular the premifes being examined

Replication in-

and mature deliberation being had thereupon; for that it feems to the faid justices here, that the faid plea of the faid William Burton before in his replication plead fushcient. . . . ded, and the matter therein contained, are no fufficient in law, to have and maintain the action of the aforesaid William against the aforesaid Char les; THEREFORE IT IS CONSIDERED, tha the aforesaid William take nothing by his wri aforesaid, but that he and his pledges of prosecut

merc advers and this he is cady to verify,

Charles Long by their faid attorneys. WHERE

Judgment, for the defendant. Querens nibil capiat per breve. ing, to wit, John Doe and Richard Roe, be i

V. herelore, tos

I.

23

be

e-

C-

de

es

e-

in

ay

bn

id

D

e-

m

he

he

id

nd

nd

es

er

nd

e-

m. ifd

ey

es

nt

of.

m.

IF

ve

iid

e

A

aid

E

D

od.

ed

to

th

ad 10

io

ar

h2

ri

ut

rc

mercy for his falle complaint; and that the aforefaid Charles go thereof without a day, &c. AND Amercement. IT IS FARTHER CONSIDERED, that the aforefaid Charles do recover against the aforefaid

Coffs.

William eleven pounds and feven shillings, for his costs and charges by him about his defence in this behalf full sined, adjudged by the court here to the faid Charles with his confent, according to the form of the statute in that case made and provided: and that the aforefaid Charles may have execu- Execution,

tion thereof, &c.

AFTERWARDS, to wit, on Wednesday next General error

after fifteen days of Easter in this same term, be- assigned. fore the lord the king, at Westminster, comes the aforefaid William Burton, by Peter Manwaring, his attorney, and faith, that in the record and process aforesaid, and also in the giving of the judgment in the plaint aforefaid, it is manifestly erred in this; to wit, that the judgment aforesaid was given in form aforesaid for the said Charles Long against the aforesaid William Burton, where by the law of the land judgment should have been

given for the faid William Burton against the faid Charles Long: and this he is ready to verify. AND the faid William prays the writ of the faid lord the facias, to hear

Writ of Scire king, to warn the faid Charles Long to be before errors.

the faid lord the king, to hear the record and process aforesaid: and it is granted unto him: by which the sheriff aforefaid is commanded that by good [and lawful men of his bailiwick] he cause the aforesaid Charles Long to know, that he be before the lord the king from the day of Easter in five weeks, wherefor ever [he shall then be in England.] to hear the record and process aforesaid, if sit shall have happened that in the same any error shall have intervened;] and farther [to do and receive what the court of the lord the king shall consider in this behalf.] The same day is given to the aforesaid William Burton. AT WHICH

DAY before the lord the king, at Westminster, comes the aforesaid William Burton, by his attor- Scire feci.

Sheriff's return:

ney aforefaid: and the sheriff returns, that by virtue of the writ aforesaid to him directed he had caused the said Charles Long to know, that he be before the lord the king at the time aforesaid in the said writ contained, by John Den and Richard Fen, good, &c. as by the same writ was commanded him: which said Charles Long, according to the warning given him in this behalf, here cometh by Thomas Webb his attorney.

WHEREUPON the faid William faith, that in Error affigned the record and process aforesaid, and also in the afresh.

giving of the judgment aforefaid, it is manifeftly erred, alleging the error aforefaid by him in the form aforefaid alleged, and prays, that the judgment aforefaid for the error aforefaid, and others, in the record and process aforesaid being, may be reversed, annulled, and entirely for nothing esteemed, and that the Vol. III.

No

for

W dr

ve

W

th

he

CI

of

W

of

fh

Bi

W

ha

ju

W

fa

2

vi

in

d

fi

t

faid Charles may rejoin to the errors aforefaid, and that the court of the faid lord the king here may proceed to the examination as well

Rejoinder ; ratum.

of the record and process aforesaid, as of the matter aforesaid above for error affigned. AND the In nullo eft er- faid Charles faith, that neither in the record and process aforesaid, nor in the giving of the judgment aforefaid, in any thing is there erred : and

he prays in like manner that the court of the faid lord the king here may proceed to the examination as well of the record and process aforesaid, as of the matters aforesaid above for Continuance. error affigned. AND BECAUSE the court of the

lord the king here is not yet advited what judgment to give of and upon the premises, a day is thereof given to the parties aforesaid until the morrow of the holy Trinity, before the lord the king, wherefoever he shall then be in England, to hear their judgment of and upon the premises, for that the court of the lord the king here is not yet advised thereof. At which day before the lord

the king, at Westminster, come the parties afore-Opinion of the faid by their attorneys aforesaid: WHEREUPcourt, ON, as well the record and process aforesaid, and the judgment thereupon given, as the matters

aforesaid by the said William above for error affigned, being seen, and by the court of the lord the king here being fully understood, and mature deliberation being thereupon had, for that it appears to the court of the lord the king here, that in the record and process

common pleas reverfed.

Judgment for the plaintiff.

Coffs.

Defendant amerced.

aforesaid, and also in the giving of the judgment - Judgment of the aforefaid, it is manifestly erred, THEREFORE IT IS CONSIDERED, that the judgment aforefaid, for the error aforefaid, and others, in the record and process aforesaid, be reversed, annulled, and entirely for nothing effeemed; and that the aforesaid William recover against the aforesaid Charles his debt aforesaid, and also fifty pounds for his damages which he hath fuffained, as well on occasion of the detention of the said debt, as for his costs and charges unto which he hath been put about his fuit in this behalf, to the faid William with his confent by the court of the lord the king here adjudged. And the faid Charles in mercy.

§. 3. Process of Execution.

Writ of capias ad fatisfaciendum.

GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith and so forth; to the heriff of Oxfordshire, greeting. WE command you, that you take Charles

Long, late of Burford, gentleman, if he may be found in your bailiwick, and him fafely keep, so that you may have his body be-

II

irt

ell

it-

he

nd

g-

nd

re

efs

for

ne

g-

he

he

eir

he

ord

re-

P-

nd

ers

en,

od,

to

efs

nt

E

re-

he

ed,

he

aid

ds

ell

for

Juc

m

ng

at he re, es ur e-

re

fore us in three weeks from the day of the holy Trinity, wherefoever we shall then be in England, to fatisfy William Burton for two hundred pounds debt, which the faid William Burton hath lately recovered against him in our court before us, and also fifty pounds, which were adjudged in our faid court before us to the faid William Burton, for his damages which he hath fustained, as well by occasion of the detention of the faid debt, as for his costs and charges to which he hath been put about his fuit in this behalf, whereof the faid Charles Long is convicted, as it appears to us of record: and have you there then this writ. WITNESS fir Thomas Denison*, knight, at Westminster, the nineteenth day of June, in the twenty-ninth year of our reign.

By virtue of this writ to me directed, I have taken the body of the within-named Charles Long; Sheriff's return; which I have ready before the lord the king, at Wellminster, at the day within-written, as within

it is commanded me.

Cepi Corpus.

GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordhire, greeting. WE command you, that of the

Writ of Fieri

goods and chattels within your bailiwick of Charles Long, late of Burford, gentleman, you cause to be made two hundred pounds debt. which William Burton lately in our court before us at Westminster hath recovered against him, and also fifty pounds, which were adjudged in our court before us to the faid William, for his damages which he hath sustained, as well by occasion of the detention of his faid debt, as for his cofts and charges to which he hath been put about his suit in this behalf, whereof the said Charles Long is convicted, as it appears to us of record: and have that money before us in three weeks from the day of the holy Trinity, wherefoever we shall then be in England, to render to the said William of his debt and damages aforefaid: and have there then this writ. WITNESS fir Thomas Denison, knight, at Westminster, the nineteenth day of lune, in the twenty ninth year of our reign.

By virtue of this writ to me directed, I have caused to be made of the goods and chattels of the within-written Charles Long two hundred and Fieri Feci. fifty pounds; which I have ready before the lord the king at Westminster at the day within-written, as it is within

Sheriff's return;

commanded me.

* The senior puisne justice: there being no chief justice that term.

ALL DE TOTAL and the state of t soul cost of northing of the stand of the local property of the stands with the barry to be a second with the wind the merchant the off in the belief the arms of a second to the second of the second to the destantion of the fire the refer of the color of the white alight of the contract of the fact that the day of considering

was and her is and the self afterness to see at reason to be been a great the as little with a will and the Thirty of the history of at gent wife, dise, only one and the -11 SI W

and the fact of control 1/2 to see a second of the control of the with the water defined too lare the kills. Langer Color of Co action at the day well an without a post in aria abaar bassarangasii in half-broom tool and and

O bus to Diray Label of the 13 16 11689 sen Senamolten enintelle you did to blatted a booking dishes any to an ananchish The William Street of the street court below as the first of the street when we are the street of th the William of the party is not could be del

when in eit tone before and out the for the bre during the and any many sale to the control of the sale of the sa was need that the first of the feet of the first state of the The state of the s

strates aforest 1: real have then other bornes. White has to mis Dendue, Selicht, as Wedmidfie die electrical at of could be such an ed that he established

The the man of the notion of the name of all and The bedien out produced to settler that the principle which I have reare belone the I all while at Wel sheller at the day within without he War part with edition and me.

La Control water judies , there be as no chief paties that seems. his see from the line, his see that the property of distribution in the contract of the contract of from a self-out rooms can the fee state thresh A CONTRACT OF THE STATE OF THE